

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

CITY OF ORMOND BEACH,
a Florida Municipal Corporation,

Plaintiff,

CASE NO.: 2012-CA-30654

DIVISION: "31"

vs.

1545 ORMOND BEACH, LLC,
a Rhode Island limited liability company,
1545 OPERATIONS, INC.,
a Rhode Island Corporation, and
OLIVIA LUMAN, an individual,

Defendants

_____ /

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

COME NOW, the Defendants / Counter-Plaintiffs, 1545 ORMOND BEACH, LLC,
and 1545 OPERATIONS, INC., by and through their undersigned attorneys, and hereby file their
Answer, Affirmative Defenses and Counterclaim, and state as follows:

ANSWER

Defendants respond as follows to the correspondingly numbered paragraphs of
Plaintiff's Complaint:

1. Admitted for jurisdictional purposes.
2. Admitted that Plaintiff seeks equitable relief only and that this Court has subject
matter jurisdiction over this action. Denied that the value of the amount in controversy is less
than \$75,000.00

3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted that 1545 Operations, Inc. leases the subject property and operates a business known as “Cheaters Gentlemen’s Club” at 1545 N. U.S. 1 in Ormond Beach. Without knowledge as to the allegation that said Defendant is an “operational arm”.
7. Without knowledge.
8. Denied. The Defendants are separately incorporated entities capable of suing and being sued in their own right.
9. Admitted that 1545 Operations, Inc. leases the subject property and operates a business known as “Cheaters Gentlemen’s Club” at 1545 N. U.S. 1 in Ormond Beach. Otherwise denied.
10. Denied that “CHEATERS” incorporated 1545 Operations, Inc. Otherwise admitted.
11. Admitted.
12. Admitted.
13. Denied that the annual report was filed on the date stated. Denied that the president is listed as Patricia A. Tapalian or that the address for the president is correct. Otherwise admitted.

14. Denied that the subject property was purchased by “CHEATERS, BY AND THROUGH LLC”. The Volusia County Property Appraiser correctly shows that the property was purchased by 1545 Ormond Beach, LLC. Otherwise admitted.

15. Admitted, with the proviso that the Lease was subsequently modified.

16. Admitted that 1545 Operations, Inc. applied for zoning approval for a 4-COP permit and that Volusia County approved all applications. Admitted that Defendant’s address was disclosed on the application. Admitted that the County zoning then in effect did not permit sexually oriented businesses within the B-6 zoning district. Any implication that Defendant operated or intended to operate a sexually oriented business is denied. All other allegations are denied.

17. Admitted that warrantless administrative searches of alcoholic beverage establishments is permitted under limited circumstances. Otherwise denied.

18. Admitted that 1545 Operations, Inc. obtained a business tax receipt from Volusia County for its business. Otherwise denied.

19. Admitted.

20. Admitted that Ormond Beach issued a business tax receipt to 1545 Operations, Inc. Otherwise without knowledge.

21. Admitted.

22. Admitted with the exception of the final sentence: “The words ‘Lounge... with Live entertainment’ were struck through.” The application prepared and submitted by Defendant’s manager did not strike through those words.

23. Admitted.
24. Admitted that Ormond Beach rezoned Defendants' property to B-7 (Highway Tourist Commercial). Admitted that sexually oriented businesses are not permitted in the B-7 zone. Otherwise without knowledge.
25. Admitted that the website with the specified URL included the copy alleged in the Complaint. Otherwise denied.
26. Admitted with respect to 1545 Operations, Inc. Without knowledge as to 1545 Ormond Beach, LLC.
27. Admitted that performers at the subject property dance for consideration paid to them by customers of the business. Otherwise denied.
28. Admitted that City law enforcement personnel have entered Defendants' property on certain occasions to perform warrantless administrative searches under state alcoholic beverage laws. Denied that other investigations were for the purposes alleged; rather such investigations were in bad faith and calculated to harass Defendants and interfere with their First Amendment rights.
29. Without knowledge as to the general allegation.
- A. Without knowledge.
 - B. Denied.
 - C. Without knowledge.
 - D. Without knowledge.

30. Without knowledge as to the general allegation; admitted that a performer was arrested on the date specified.

A. Denied.

B. Denied.

31. Without knowledge as to the general allegation; admitted that a performer was arrested on the date specified. Admitted that the arrest was recorded by management.

A. Without knowledge as to “Lori’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

32. Denied.

33. Without knowledge as to the general allegation; admitted that a performer was arrested on the date specified. Admitted that the arrest was recorded by management.

A. Without knowledge as to “Angel’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

B. Denied.

C. Without knowledge as to “Karma’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises.

D. Without knowledge.

34. Without knowledge as to the general allegation; admitted that two performers were arrested on the date specified. Admitted that the arrest was recorded by management.

A. Without knowledge as to “Luman’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

B. Without knowledge as to “Airka’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

35. Without knowledge as to the general allegation; admitted that two performers were arrested on the date specified. Admitted that the arrest was recorded by management.

A. Without knowledge as to “Roxie’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

B. Without knowledge as to “Luman’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. Admitted that

Luman was accused of having violated a municipal ordinance; without knowledge as to the disposition of those charges. All other allegations are denied.

36. Without knowledge.

37. Without knowledge as to the general allegation; admitted that a performer was arrested on the date specified. Admitted that the arrest was recorded by management.

A. Without knowledge as to “Roxie’s” actions or conversations. Without specific knowledge as to whether the officer was “wanded”, although security personnel are instructed to wand every customer to guard against weapons on the premises. All other allegations are denied.

38. Denied.

39. Admitted.

40. Admitted that 1545 Operations presents dance performances to its customers in a commercial (nightclub) setting. Otherwise denied.

41. Admitted that 1545 Operations sells alcoholic beverages. Otherwise denied.

42. Denied.

43. Denied.

44. Admitted that Defendants do not have a license to operate a sexually oriented business. Denied that Defendants are required to obtain such a license.

45. Denied.

46. Defendants reallege their responses to the paragraphs 1 through 45 as if set forth fully herein.

47. Admitted for jurisdictional purposes only.
48. Admitted that 1545 Operations obtained permission to operate a nightclub that is not a sexually-oriented business establishment. All other allegations are denied.
49. Denied.
50. Denied. Defendants do not operate a sexually-oriented business and that fact is well-known to the Plaintiff. Furthermore, Plaintiff knows or should know that its adult zoning and licensing provisions are unconstitutional on their face under controlling precedent. Plaintiff cannot be in doubt as to its rights given controlling law on the subject.
51. Without knowledge.
52. Denied.
53. Denied. The City remains free to enforce state and local criminal laws, which are the proper avenue for enforcement of the violations complained.
54. Without knowledge.
55. Defendants reallege their responses to the paragraphs 1 through 45 as if set forth fully herein.
56. Denied. Injunctive relief is not available to enjoin future dance performances on the supposition that such future performances may violate the law. Such injunctive relief would impose an unconstitutional prior restraint on LUMAN's First Amendment rights and would have a chilling effect on the performances of other dancers at Defendant's establishment.
57. Without knowledge.
58. Denied.

59. Denied. Defendants further state that injunctive relief is not available to enjoin future dance performances on the supposition that such future performances may violate the law. Such injunctive relief would impose an unconstitutional prior restraint on LUMAN's First Amendment rights and would have a chilling effect on the performances of other dancers at Defendants' establishment.

60. Denied.

61. Denied.

62. Denied.

55. Defendants reallege their responses to the paragraphs 1 through 45 as if set forth fully herein.

64. Admitted for jurisdictional purposes only.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

76. Denied.

77. Denied.

78. Denied.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

(Unconstitutional Ordinances)

1. The City's zoning and licensing provisions relative to adult businesses are unconstitutional on their face because they impose a prior restraint without providing all of the substantive and procedural guarantees required by FW/PBS v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, (1990) and because the zoning code fails to provide alternative avenues of communication for adult businesses (*i.e.*, the ordinance creates a complete "zone out" for adult uses). An unconstitutional law is void and cannot be enforced against the Counter-Plaintiffs.

SECOND DEFENSE

(Lawful Non-conforming Use)

2. At the time Defendants opened the subject bikini bar it was a lawful conforming use within unincorporated Volusia County. Defendants have not changed their format in any respect since they began operating the business. Subsequent to opening their business, the subject property was annexed into the City of Ormond Beach. To the extent that Defendants' business format varies from what is currently permitted by the City of Ormond Beach zoning code, Defendants are a lawful non-conforming use and the City may not retroactively enforce its zoning laws against the Defendants.

THIRD DEFENSE

(Vested Rights)

3. At the time Defendants opened the subject bikini bar it was a lawful conforming use within unincorporated Volusia County. Defendants have not changed their format in any respect since they began operating their business. Subsequent to opening the business, the subject property was annexed into the City of Ormond Beach. ORMOND BEACH cannot retroactively enforce its zoning laws against Defendants to forbid a format which was lawful under the County's zoning ordinance because CHEATERS established vested rights in that format.

FOURTH DEFENSE

(No Sexually Oriented Business)

4. Defendant 1545 Operations owns and operates a "bikini bar" in which performers are clothed at all times in bathing suits which cover their "specified anatomical areas". Defendants do not permit "specified sexual acts" to occur on their premises. By definition, Defendants do not operate a sexually oriented business nor do they hold themselves out to the public as a sexually oriented business. Defendants' format is materially indistinguishable from the many other bikini bars operating in Volusia County and its incorporated municipalities, none of which are licensed or regulated as sexually oriented businesses.

FIFTH DEFENSE

(No Vicarious Liability)

5. Defendants cannot be penalized on a vicarious basis for the alleged crimes of independent contractors without a showing of *mens rea* or intent.

SIXTH DEFENSE

(No Responsible Relationship)

6. Defendants cannot be penalized on a vicarious basis for the alleged crimes of independent contractors where there is no showing of a responsible relationship.

SEVENTH DEFENSE

(Pretextual Enforcement / Bad Faith Enforcement)

7. The CITY OF ORMOND BEACH has been engaged in a concerted effort to harass Defendants through selective and pretextual police enforcement, through litigation, and through such actions as cutting off Defendants' utilities, all for the purpose of censoring and deterring Defendants' speech rights because the CITY disagrees with the content of that speech. The City's enforcement activities have not been conducted in good faith, but are retaliatory actions calculated to interfere with Defendants' speech activities. The CITY has intentionally violated Defendants' constitutional rights and comes before this Court with unclean hands.

EIGHTH DEFENSE

(Unclean Hands)

8. The CITY is attempting to enforce laws which it knows or should know are facially unconstitutional and it has done so in a wider context of harassment and police action specifically intended to violate Defendants' constitutional rights. The CITY OF ORMOND BEACH is not entitled to equitable relief of any kind because it comes before the Court with unclean hands.

COUNTERCLAIM

COME NOW the Defendants / Counterclaim Plaintiffs, 1545 ORMOND BEACH, LLC, and 1545 OPERATIONS, INC., and hereby sue the Counterclaim Defendant, CITY OF ORMOND BEACH, and say:

COMMON ALLEGATIONS

1. This suit is brought pursuant to 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

2. This Court also has jurisdiction under Chap. 86. Fla.Stat. to enter declaratory judgments and to provide supplemental relief. The value of the relief sought exceeds \$75,000.00.

3. The Court may enter an award of attorney's fees pursuant to 42 U.S.C. §1988.

4. This Complaint seeks declaratory and injunctive relief to prevent violations of the Counter-Plaintiffs' rights, privileges and immunities under the Constitution of the United

States and Title 42 U.S.C. §§1983 and 1988, specifically seeking redress for the deprivation under color of state statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the Constitution and laws of the United States. The rights sought to be protected in this cause of action arise and are secured under the First and Fourteenth Amendments to the Constitution.

5. This action seeks a judicial determination of issues, rights and liabilities embodied in an actual and present controversy between the parties involving the constitutionality of certain Ordinances and policies of the Counter-Defendant. There are substantial *bona fide* doubts, disputes, and questions that must be resolved concerning the CITY's actions taken under color and authority of "state law" and procedures, in violation of Counter-Plaintiffs' rights under the First and Fourteenth Amendments to the Constitution.

6. Counter-Defendant, CITY OF ORMOND BEACH, is a Florida municipal corporation, organized and operating under the laws of the State of Florida.

7. ORMOND BEACH encompasses a land area of some 31.9 square miles with a population of at least 38,137 people. ORMOND BEACH is a busy tourist community hosting much of the overflow from nearby Daytona Beach's special events such as "Spring Break", "Black College Reunion" and the Daytona 500.

8. 1545 ORMOND BEACH, LLC is a Rhode Island limited liability company which is properly registered with the State of Florida as a foreign limited liability company. 1545 ORMOND BEACH, LLC is beneficially interested in the relief herein sought and seeks to invoke the original jurisdiction of this Court on account of the facts and matters herein stated.

9. 1545 ORMOND BEACH, LLC owns the property located at 1545 N. U.S. Highway 1, within the municipal limits of Ormond Beach, Volusia County, Florida. 1545 ORMOND BEACH, LLC purchased the subject property on or about February 24, 2010.

10. 1545 OPERATIONS, INC., is a Rhode Island Corporation which leases the subject real property at 1545 N. U.S. Highway 1, Ormond Beach, Florida. 1545 OPERATIONS, is likewise properly registered to do business in Florida as a foreign corporation. 1545 OPERATIONS, INC. is beneficially interested in the relief herein sought and seeks to invoke the original jurisdiction of this Court on account of the facts and matters herein stated.

11. 1545 ORMOND BEACH, LLC does not directly control the CHEATERS business, but has only those limited rights available to landlords. However, Defendant is directly affected by the zoning and land use restrictions applicable to its property.

12. 1545 OPERATIONS, INC. owns and operates a “gentlemen’s club” known as “CHEATERS” at the said location, which features live exotic dance performances in a night club setting featuring a full-service bar.

13. CHEATERS is properly described as a “gentlemen’s club”; it is not a seedy dive, but is a classy, well-maintained, clean and upscale nightclub catering to tourists and business people. The local newspaper has commented on the fact that CHEATERS has generated considerably fewer problems for law enforcement than other bars within ORMOND BEACH. Counter-Plaintiffs have invested many tens of thousands of dollars into developing this nightclub and are rightfully proud of their establishment.

14. 1545 OPERATIONS, INC. opened CHEATERS for business on Friday, October 1, 2010.

15. At the time CHEATERS opened for business, the subject property was in unincorporated Volusia County and was outside the regulatory authority of ORMOND BEACH.

16. At the time CHEATERS opened for business, it had received all of the licenses and approvals required by Volusia County which was the governmental entity which had lawful authority to regulate Counter-Plaintiffs' property.

17. Counter-Plaintiffs' business format (properly described as a "bikini bar") complied with all of the zoning and regulatory ordinances of Volusia County at the time CHEATERS opened for business.

18. The subject property was later annexed by the CITY OF ORMOND BEACH. The annexation ordinance was approved on or about October 7, 2010.

19. CHEATERS is not an adult entertainment establishment or sexually oriented business because the performers wear coverings over their breasts, buttocks and pubic region at all times. In addition, performers at CHEATERS do not engage in "specified sexual acts". CHEATERS' business format may generally be described as a "bikini bar".

20. The policy at Counter-Plaintiffs' business requires performers to cover their breasts, buttocks and pubic region at all times during their dance routines. Performers who fail to follow that policy are subject to disciplinary action including the termination of their independent contractor agreements.

21. The overwhelming majority of dance performances conform strictly to club policy and local laws. Disciplinary action has been quite rare, although several performer contracts have been terminated, including the performers arrested for violations of the City's nudity ordinance.¹

22. The dance performances offered at Counter-Plaintiffs' business are presumptively protected by the First Amendment to the United States Constitution. Counter-Plaintiffs have a clear legal right to engage in protected speech of this nature.

23. This expressive activity is performed before a consensual audience, all over the age of 18 years, desirous of receiving and enjoying the message conveyed by the entertainer of normal human sexual interest and sensual subtleties.

24. Counter-Plaintiffs believe that providing this form of expressive communication to the public is a beneficial social activity which enhances individuals' conscious ability to assimilate and consider various issues involving sexual candor and the interest in human sexuality that all human beings have to a greater or lesser degree. Counter-Plaintiffs consider this expression to enhance the appreciation of the human body, with an emphasis on the consideration of popular contemporary concepts of physical attractiveness and the stimulating and entertaining aspects of same, which are characteristics of a normal and healthy interest in human sexuality.

¹ An exception was made for one of the performers who is defending against the criminal charges and claims that she did not engage in any illegal activities. A preliminary investigation by CHEATERS' staff suggested that the performer's version of events was believable and that there was likely no violation of any municipal ordinances.

25. The expression to be offered by Counter-Plaintiffs' business is not intended to be obscene as contemplated by contemporary community standards. Counter-Plaintiffs do not intend this expression to appeal to any prurient interest. Counter-Plaintiffs believe the specified performances contain serious artistic value.

26. All of the Counter-Plaintiffs' performances take place behind closed doors and none of the performances are visible to passersby or to those persons who have not voluntarily sought access to the establishment.

27. Counter-Plaintiffs were entitled to operate an adult business at their present location from the time of their original application to Volusia County; the CITY'S laws regulating sexually oriented businesses were and are unconstitutional on their face and as applied against the Counter-Plaintiffs.

28. Counter-Plaintiffs' right to operate an adult business at their present location vested no later than October 1, 2010.

29. Even if the CITY's adult zoning provisions are found to be constitutional Counter-Plaintiffs are entitled to maintain and operate an adult business at their present location as a lawful nonconforming use (*i.e.*, they are "grandfathered in") because the laws in effect at the time Counter-Plaintiffs first applied to do business were unconstitutional. *See, e.g., Augusta Video, Inc. v. Augusta-Richmond County, GA*, 249 Fed.Appx. 93, 2007 WL 2510151 (11th Cir. 2007).

30. Counter-Plaintiffs' business was and is entitled to operate at their present location as a lawful use. Any subsequent zoning ordinances have no retroactive effect as against Counter-Plaintiffs' as their business is a lawful non-conforming use.

Bona Fide Dispute

31. Counter-Plaintiffs maintain that the ORMOND BEACH ordinances regulating sexually oriented businesses have no application to their business or their particular format. However, to the extent that such ordinances do apply to the Counter-Plaintiffs, all of the CITY'S ordinances governing sexually oriented businesses are unconstitutional on their face and as applied to the Counter-Plaintiffs for the reasons set forth in this Counterclaim.

32. If this Court determines that Counter-Plaintiffs do not operate sexually oriented business and are not subject to the City's licensing, zoning and regulatory ordinances governing sexually oriented business, there will be no need to rule on Counter-Plaintiffs' constitutional challenges set forth below.

33. If this Court determines that the Ormond Beach licensing, zoning and regulatory ordinance do apply to Counter-Plaintiffs' activities, this Court will be called upon to declare those ordinances unconstitutional and unenforceable against Counter-Plaintiffs and all other persons similarly situated.

34. Counter-Plaintiffs have a clear legal right to the use of their property without undue interference by the CITY, their agents, servants or employees. The lawful use of the Counter-Plaintiffs' property may only be restricted or terminated after Counter-Plaintiffs have been afforded due process of law, as guaranteed by the Fourteenth Amendment to the United

States Constitution. Counter-Plaintiffs have been denied due process of law by the unconstitutional application of the Ordinances at issue.

35. The attempted enforcement of ORMOND BEACH's adult licensing and zoning ordinances against the Counter-Plaintiffs has deprived and will continue to deprive Counter-Plaintiffs, and their employees, contractors and patrons, of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.

36. Counter-Plaintiffs assert that their position set forth in this Counterclaim is legally sound and supported by fact and law. The CITY's actions however have created a *bona fide* controversy between the parties, and Counter-Plaintiffs are in doubt as to their rights, privileges and immunities with respect to the enforcement of the legislation at issue herein. Counter-Plaintiffs therefore require a declaratory judgment declaring their rights, privileges and immunities. There is a clear, present, actual, substantial, and *bona fide* justiciable controversy between the parties.

37. Counter-Plaintiffs will be unable to engage in speech which is clearly protected by the First Amendment to the United States Constitution and face the prospect of criminal prosecution for such activities should an injunction not issue. Deprivation of rights guaranteed under the Constitution is an irreparable injury for purposes of injunctive relief.

38. The injury to Counter-Plaintiffs, should the CITY continue its unconstitutional enforcement of its adult business regulations exceeds any possible harm to the CITY. Counter-Plaintiffs' injury is the loss of a constitutional right. On the other hand, since no government agent may deprive any person of a right guaranteed by the Constitution, ORMOND BEACH

will suffer no injury if it is prevented from suppressing Counter-Plaintiffs' constitutional rights, including the right to freedom of expression. The public has no lawful interest in the enforcement of unconstitutional laws.

39. The public interest would be served by the granting of injunctive relief. In fact, the public interest is disserved by actions, such as those of ORMOND BEACH which interfere with the public's rights guaranteed under the First Amendment.

40. A permanent injunction will preserve Counter-Plaintiffs' civil rights and avoid the need to compensate Counter-Plaintiffs with money damages for violation of their rights.

41. All conditions precedent to the institution and maintenance of this cause of action have occurred or have been performed.

Color of State Law

42. As a political subdivision of the State of Florida, organized and operating under the laws of the State of Florida, the CITY OF ORMOND BEACH and its governing officials were, and are, acting under color of state law and authority in adopting and enforcing the subject Ordinances. The enforcement and threatened enforcement of the subject Ordinances against Counter-Plaintiffs is an action taken under color of state law and constitutes state action within the meaning of 42 U.S.C. §1983.

Attorney's Fees

43. Counter-Plaintiffs have retained GARY S. EDINGER, P.A. and BRETT HARTLEY, P.A. as their attorneys to represent them in this action and have agreed to pay

them a reasonable fee, which fee the CITY OF ORMOND BEACH must pay pursuant to 42 U.S.C. 1988.

Adult Business Regulations - Generally

44. ORMOND BEACH restricts the operation of “sexually oriented businesses” (also referred to herein as “adult businesses”) through its Code of Ordinances. Those regulations are codified in Chapter 12, Article XIV, “Sexually Oriented Business Establishment Permit and License Requirements”, Sections 12.390 through 12.413 of the Code of Ordinances, a copy of which is attached as Exhibit “A” to this Counterclaim.

45. ORMOND BEACH restricts the location of “sexually oriented businesses” through two principal sections of its Land Development Code:

A. Chapter 2, Article IV, “Conditional Uses and Special Exception”, Section S(2), Land Development Code, a copy of which is attached as Exhibit “B” to this Counterclaim; and

B. The City’s zoning matrix, which includes a list of permitted uses in table form, codified as Chapter 2, Article II, Sections 2-08 through 2-38, a copy of which is attached as Exhibit “C” to this Counterclaim.

46. The Code of Ordinances does not have a specific definition for a “sexually oriented business”. Instead, that definition appears in Chapter 1, Article III, §1-22 of the City’s Zoning Code:

Sexually Oriented Business or Use: Sexually Oriented Business or Uses shall be defined as a business operated for commercial or pecuniary gain, regardless of whether such establishment is licensed under these regulations. “Operated for commercial or pecuniary gain” shall not depend upon actual profit or loss. An establishment which has a Business Tax Receipt shall be presumed to be “operated for commercial or pecuniary gain.” An establishment

with an adult use license and/or adult use permit shall be presumed to be a sexually oriented business or use which includes the terms adult arcade, adult bookstore, adult hotel/motel, adult booth, adult theater, special cabarets, physical culture establishments, and adult photographic and modeling studios, as defined in sub-definitions below, including any business establishment whose primary business stock-in trade is dependent upon the activities relating to “specified sexual activities,” “specified anatomical areas,” or straddle dances” as defined in the operating regulations for sexually oriented businesses contained in the City Code of Ordinances. Sexually oriented businesses are those uses, excluding drinking establishments which serve alcohol, which are not open to the public generally, but only to one or more classes of public and excluding any minors by reason of age, a minor being a person under the age of 18 years.

47. The hallmark, then of a “sexually oriented business” is a commercial establishment “whose primary business stock-in trade is dependent upon the activities relating to “specified sexual activities,” “specified anatomical areas,” or straddle dances”.

26. Those terms are not defined in the City’s Zoning Code, but are defined in Chapter 12, Article XIV, Section 12-392 of the Ormond Beach Code of Ordinances:

Specified anatomical areas means:

(1) Less than completely or opaquely covered:

- a. Human genitals or pubic region;
- b. The entire cleft of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-strings, T-backs, and thongs;
- c. That portion of the human female breast below a point immediately above the top of the areola; this definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit or other wearing apparel, provided the areola is not so exposed.

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Specified sexual activities means:

- (1) Human genitals in a state of sexual stimulation or arousal or tumescence;
or
- (2) Acts of anilingus, bestiality, buggery, cunnilingus, coprophagy, coprophilia, fellation, flagellation, masochism, masturbation, necrophilia, pederasty, pedophilia, sadism, sadomasochism, sapphism, sexual intercourse, sodomy, urolagnia or zooerasty; or
- (3) Fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast; or
- (4) Excretory functions as part of, or in connection with, any of the activities set forth in subsections (1) through (3) of this definition.

Straddle dance/lap dance/table dance/face dance shall mean either of the following acts:

- (1) The use by an employee of any part of his or her body to touch the genital or pubic area of a person, excluding another employee, while at the sexually oriented business establishment, or touching the genital or pubic area of any employee by a person, excluding another employee, while at the sexually oriented business establishment in exchange for receiving a tip, donation, gratuity, or anything of value, including but not limited to money. It shall be a straddle dance regardless of whether the "touch" or "touching" occurs while the employee is displaying or exposing any specified anatomical area. It shall also be a straddle dance regardless of whether the touch or touching is direct or through a medium.
- (2) The straddling of the legs of an employee over any part of the body of a person, other than another employee at the sexually oriented business establishment, regardless of whether there is a touch or touching.

48. The City divides sexually oriented business into a variety of categories including, "Adult bookstore", "Adult hotel/motel", "Adult theater", "Adult photographic or modeling studio", "Physical culture establishment" and "Special cabaret".

49. “Special cabaret” is not specifically defined by either the Ormond Beach Code of Ordinances or the City’s Zoning Code. However, there is a general description of several categories of adult uses which provides some guidance as to the intended meaning of this term:

Sec. 12-409. - Special cabarets, adult photographic or modeling studios, and adult theaters.

In addition to the general requirements for a sexually oriented business establishment contained in section 12-407, a special cabaret, an adult photographic or modeling studio, and an adult theater, where a live performance in which the display or exposure of any specified anatomical area by an employee occurs shall observe the following special requirements:

50. Based upon this description and the allegations of the CITY’s Complaint, it appears that the CITY believes that Counter-Plaintiffs operate the subcategory of sexually oriented business known as a “special cabaret”.

51. Counter-Plaintiffs do not operate a sexually oriented business as defined by the Ormond Beach Code of Ordinances or the City’s Zoning Code.

52. Counter-Plaintiffs do not operate a special cabaret as defined by the Ormond Beach Code of Ordinances or the City’s Zoning Code.

53. Counter-Plaintiffs do not suffer or permit “specified sexual acts” or straddle dancing” to occur on their premises and they do not offer or allow the exposure of “specified anatomical areas”.

54. Although the terms “primary business stock-in trade” and “dependent upon” are nowhere defined in the City’s Codes, Counter-Plaintiffs assert that their “primary business stock-in trade is not “dependent upon “specified sexual activities,” “specified anatomical areas,” or “straddle dances”.

Adult Business Zoning Provisions

55. There are no locations within ORMOND BEACH where sexually oriented businesses may open and operate as a matter of right.

56. ORMOND BEACH restricts adult entertainment establishments to the B-8 Commercial Zone.

57. This is determined by reviewing all of the zoning matrices listed in the Ormond Beach Zoning Code [codified as Chapter 2, Article II, Sections 2-08 through 2-38 and attached hereto as Exhibit “C”. Of those zoning matrices, only Section 2-29 – the B-8 Commercial zone - lists sexually oriented business as a permissible use.

58. In addition to being limited to a single zone, the City imposes locational requirements whereby sexually oriented business are separated from certain “sensitive uses” which severely limit the number of sites available in the B-8 district. Those buffers or setbacks are set forth in Chapter 2, Article IV, Section S(2) of the City’s Land Development Code (*see*, Exhibit “B”):

1. No sexually oriented business establishment may be located within 500 feet of any residential zoned land use property, or any portion of a mixed use land use category developed and utilized as residential, any church, school, child care facility or public recreation area which is validly located or has previously received legal authority to locate.
2. No sexually oriented business establishment may be located within 500 feet of any other sexually oriented business establishment, regardless of whether or not the other sexually oriented business establishment is located within the corporate boundaries of the city or in an adjacent jurisdiction.
3. No sexually oriented business establishment may be located within 250 feet of any business establishment that sells or serves alcohol for on or off-premise consumption.

See, also, Section 12-410(b)(4), City Code (Requiring disclosure of all sensitive uses within those distances as a requirement for issuance of an adult business license).

59. In addition to the setback requirements imposed by local ordinance, the State of Florida prohibits any sexually oriented business from operating within 2,500 feet of any “public or private elementary school, middle school, or secondary school”. The statutory setback exists independently of the Ormond Beach ordinances and further restricts the locations available for sexually oriented businesses. *See*, §847.0134, Fla.Stat.

60. Even in the B-8 zone, sexually oriented businesses which meet the applicable set-backs are not permitted as of right. Instead, they are listed as a “conditional use” in the zoning matrix. *See*, Section 2-29, D-18, LDC.

61. Furthermore, the Ormond Beach Land Development Code specifically states that no sexually oriented business may open and operate without first obtaining a conditional use permit. *See*, Section 2-57 (S)-2 LDC (“In addition to demonstrating compliance with all general criteria included in Chapter 1, Article II, any applicant for a proposed conditional or Special Exception must submit plans that demonstrate compliance with the following specific criteria which shall apply within all districts... (S)-2 Sexually Oriented Business or Use”).

62. The Ormond Beach Code of Ordinances likewise confirms that an adult business must obtain a conditional use permit before it can open and operate:

Sec. 12-410. - Sexually oriented business permits and licenses.

...

(c) *Inspection and issuance of certificate.* Upon receipt of a completed application, a planning department staff person shall inspect the proposed location of the sexually oriented business to determine compliance

with the conditional uses of a permitted sexually oriented business establishment and, within ten (10) working days, issue a written compliance determination....

63. Even if an applicant meets all of the zoning and setback requirements, the Ormond Beach Code allows the Staff and/or City Commission to deny a conditional use permit or to impose additional restrictions and conditions in their unfettered discretion. The nominal criteria for evaluating conditional use applications include the following:

SECTION 2-56: GENERAL CONDITIONAL AND SPECIAL EXCEPTION REVIEW CRITERIA

In addition to the standards contained in Chapter 2, Article II, applications for a proposed conditional use or Special Exception shall provide plans that demonstrate compliance with the following general criteria:

A. **Off-Street Parking, Loading and Service Areas.** Off-street parking, loading and service areas shall be provided and located such that there is no adverse impact on adjoining properties, beyond that generally experienced in the district.

B. **Required Yards, Screening or Buffering, and Landscaping.** Required yards, screening or buffering, and landscaping shall be consistent with the district in general, the specific needs of the abutting land uses, Chapter 3, Article 1, and other applicable provisions of this Code.

C. **Size, Location, or Number of Conditional and Special Exceptions.** Size, location, or number of conditional and special exceptions in an area shall be limited so as to maintain the overall character of the district in which said conditional or special exceptions are located.

D. **Hours of Operation.** Hours of operation may be limited and the City may require additional information on structural design and site arrangement, to assure the compatibility of the development with existing and proposed uses in the surrounding area. For instance, hours of operation may be restricted to avoid potential adverse impacts on a conforming residential use or on an adjacent residential district.

....

64. It is unclear on the face of the Land Development Code what procedures apply to review of conditional use applications. The definition of “conditional use” appears to contemplate only staff review without a public hearing.² In addition, Chapter 12, Article XIV, Section 12-413 contemplates that the City Commission will hear appeals “from interpretations and determinations of the planning director of the Land Development Code and Code of Ordinances, where applicable.”³ That provision seems to suggest that staff is responsible for review of conditional use applications prior to the involvement of the City Commission. However, Section 2-55, which specifically governs conditional use applications, states that the “[t]he procedures for notice, review, and approval shall be as set forth in Chapter 1, Article II.”

65. The conflicting and irreconcilable provisions for review and appeal render the entirety of the Ormond Beach Zoning Code unconstitutionally vague and unenforceable as applied to sexually oriented businesses.

66. Chapter 1, Article II does not include procedures specific to “conditional uses”. However, there are procedures listed for special exceptions which are similar in nature to

² The definition of “Conditional Use” in Chapter 1, Article III, Section 1-22 states as follows: “Staff approval for a use permitted in a particular zoning district that may be compatible within part of a district but not throughout the district and is permitted only upon successful demonstration by an applicant that the use as proposed on a specific site will comply with all the conditional use criteria and standards for location, design, and/or operation.”

³ No procedures are specified as to how the City Commission would conduct an appeal from a staff decision. Presumably, the facially unconstitutional land use procedures from Chapter 1, Article II would apply to those appellate proceedings. If the land use procedures do not apply, the review process is still unconstitutional as there would be no established procedures at all to govern timely review of the application.

conditional uses. Those procedures envision a public hearing before the Planning Board followed by a separate public hearing before the City Commission:

Chapter I, Article III, Section 1-15(D)-2:

2. **Planned Developments and Special Exceptions.** The Board shall hold one public hearing on each application after due public notice is provided and shall thereafter forward its recommendation to the City Commission...

Chapter I, Article III, Section 1-18(B):

B. **Special Exceptions.** The City Commission shall hold a public hearing following Planning Board consideration of applications requiring such hearing under this Code. The City Commission may approve, approve with conditions, or deny such applications. Notice of such hearings shall be provided as follows:

1. The City shall publish a legal notice of hearing in a newspaper of general circulation at least 10 days prior to the City Commission public hearing. The notices shall state the date, time, place, and purpose of the meeting. The notice shall state that interested parties will have an opportunity to be heard.

2. The City shall notify, by certified mailing list, all property owners as identified in the current tax roll within 300' at least 14 days prior to the City Commission meeting. The notice shall state the date, time, place and purpose of the meeting and that interested persons will have an opportunity to be heard.

67. The Land Development Code provides minimum requirements for public notice but does not specify a brief period of time within which a permitting decision must be made and does not specify the consequences of a failure to make a timely decision.

68. Regardless of whether approval of a conditional use permit is obtained from staff or after public hearing before the Planning Commission and the City Commission, the procedures in place for such approval violate the First Amendment because they fail to include all of the substantive and procedural protections required by FW/PBS v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, (1990).

Adult Licensing Provisions

69. In addition to securing approval as a conditional use under the Land Development Code, a business owner must obtain *two* additional licenses or permits from the City under the Ormond Beach Code of Ordinances before he can open and operate:

A. The Code of Ordinances requires a sexually oriented business license under 12-395:

Sec. 12-395. - Sexually oriented business license required; classification.

(a) *Requirement.* No sexually oriented business establishment, except an adult bookstore operating only as an adult bookstore, shall be permitted to operate without having been first granted a sexually oriented business license by the planning department under these regulations.

B. The Code of Ordinances also requires a separate “sexually oriented business permit” under Section 12-410:

Sec. 12-410. - Sexually oriented business permits and licenses.

(a) *Permits required.* No sexually oriented business establishment shall be allowed to commence or continue to operate without first obtaining a valid sexually oriented business permit and if applicable a license. Any person desiring to locate, operate or continue operating of any sexually oriented business shall be required to obtain a sexually oriented business permit from the planning department before the establishment or commencement of business as an sexually oriented business....

70. The applicant must obtain a §12-410 sexually oriented business permit before he can obtain a §12-395 sexually oriented business license. This requirement is clear on the face of the Code because the §12-410 sexually oriented business permit must actually be attached to the application for a §12-395 license:

Sec. 12-396. - Application required for sexually oriented business license; contents of; application fee; rejection of incomplete application; consent by applicant.

...

(b) Contents of application. The completed application shall contain the following information and shall be accompanied by the following documents:

...

(14) A valid sexually oriented business permit signed by the planning director or his designee pursuant to section 12-410 of these regulations...

71. The “sexually oriented business permit” issued pursuant to §12-410 is required in addition to the conditional use approval mandated under the Land Development Code. Presumably, one must obtain approval for a conditional use before one can obtain the §12-410 permit.

72. Section §12-410 fails to require that a permitting decision be made within a specified brief period of time and also fails to ensure a prompt judicial disposition as the CITY has the ability to indefinitely delay its administrative proceedings, thereby preventing any exhaustion of administrative remedies.

73. The permitting procedures for obtaining the §12-395 sexually oriented business license are also unconstitutional for failure to constrain the discretion of the decisionmaker, for failure to guarantee a licensing decision within a specified brief period of time, and for failure to provide for prompt judicial review.

74. Because of the evident complexities of the CITY’s adult entertainment regulations and the inseparable relationship between the zoning, licensing and regulatory provisions, the foregoing provisions (particularly, the definitions, licensing requirements and

punitive measures) cannot be severed from the regulations as a whole and the entire adult entertainment scheme must be declared unconstitutional.

COUNT I

(Declaratory Relief – No Sexually Oriented Business)

75. Counter-Plaintiffs re-allege and incorporate paragraphs 2 through 74 of their Counterclaim as if fully set out herein.

76. Counter-Plaintiffs seek a declaratory judgment that they do not operate a sexually oriented business and that the zoning and licensing provisions of the CITY'S adult entertainment regulations do not apply to it.

77. Counter-Plaintiffs are uncertain as to their rights and remedies under the Ormond Beach Land Development Code and City Code of Ordinances, and under the Constitutions of the United States and the State of Florida.

78. Counter-Plaintiffs maintain that they operate a "bikini bar" which, by definition, is not subject to the CITY's regulations pertaining to sexually oriented businesses.

79. Counter-Plaintiffs are located in a proper zone for nightclubs and do not operate a sexually oriented business. Furthermore, Counter-Plaintiffs do not advertise or offer nude or partially nude performances at CHEATERS. Any violations of the CITY's ordinances are rare and fleeting and are contrary to the promulgated rules of Counter-Plaintiffs' business.

Even accepting as true the facts set forth in the CITY's Complaint, Counter-Plaintiffs are in compliance with the ORMOND BEACH zoning and licensing laws.

80. The CITY filed the instant action asserting that Counter-Plaintiffs are subject to the CITY's regulations pertaining to sexually oriented businesses.

81. Since opening in 2010, Counter-Plaintiffs have offered dance performances by scores, if not hundreds of performers acting as independent contractors. Those scores or hundreds of dancers have performed many thousands of dance routines.

82. The CITY alleges that, of those hundreds of dancers and thousands of dancer performances, a few violated the prohibitions against nudity and physical contact in an alcoholic beverage establishment.

83. The CITY enforced its criminal laws pertaining to public nudity and physical contact against those few alleged lawbreakers.

84. The CITY takes the position that each individual display of nudity constitutes a separate violation of the ORMOND BEACH Code and Land Development Code. If true, each such violation is cured when the performer in question dons clothing sufficient to meet the requirements of the Ordinance. The CITY's remedy is to fine or incarcerate the individual performer who violates the law; such individual violations do not represent a continuous and ongoing violation of the City's zoning laws.

85. Counter-Plaintiffs do not directly control the attire or choreography of their independent contractors. However, Counter-Plaintiffs have adopted and enforce a policy that performers must strictly adhere to local and state regulations governing dance performances.

86. Counter-Plaintiffs enforced their strict policies against nudity and physical contact by terminating the contracts of the performers who were alleged to have violated the municipal ordinances.

87. The CITY has not alleged that it arrested any of Defendant's management staff for violations of the municipal ordinances pertaining to sexually oriented businesses.

88. Pursuant to the terms of the CITY's Zoning Code a sexually oriented business is one "whose primary business stock-in trade is dependent upon the activities relating to 'specified sexual activities,' 'specified anatomical areas,' or 'straddle dances'". *See*, Chapter 1, Article III, §1-22 of the City's Zoning Code.

89. CHEATERS's "primary business" is not "dependent upon the activities relating to 'specified sexual activities,' 'specified anatomical areas,' or 'straddle dances'".

90. CHEATERS' primary business is the sale of alcoholic beverages with the provision of entertainment in the form of "bikini dancing".

91. That activity is entirely lawful and is no different than that engaged in by many other "bikini bars" in Volusia County and its incorporated municipalities. Those other establishments are not regulated as sexually oriented businesses.

92. Rare (and as yet unproven) allegations that performers at Counter-Plaintiffs' business engaged in "straddle dances" or "specified sexual activities" or that they displayed their "specified anatomical areas" does not establish the fact that Counter-Plaintiffs are operating a sexually oriented business. *See*, P.J.J.L., Inc. v. The City of Daytona Beach, Case No.: 2008-33754-CICI (Fla. 7th Jud. Cir., Volusia County) (Appellate decision finding that Daytona

Beach could not enforce its adult zoning regulations against a bikini bar under the facts or as a matter of constitutional law).

WHEREFORE, Counter-Plaintiffs pray for the following relief:

- A. That this Court take jurisdiction over the parties and this cause;
- B. That this Court enter a judgment declaring that Counter-Plaintiffs' business constitutes a lawful use at its present location.
- C. That this Court enter a judgment declaring that Counter-Plaintiffs' business is not subject to the zoning and licensing provisions of the CITY's sexually oriented business ordinances because Counter-Plaintiffs do not operate a sexually oriented business.
- D. That this Court award Counter-Plaintiffs all other relief in law and in equity to which they may be entitled.

COUNT II

(Declaratory Relief – Lawful Nonconforming Use)

93. As a second and alternate Count, Counter-Plaintiffs re-allege and incorporate paragraphs 2 through 74 of their Counterclaim as if fully set out herein.

94. Counter-Plaintiffs seek a declaratory judgment that they are entitled to operate CHEATERS under its current format at its current location as a lawful, nonconforming use.

95. Counter-Plaintiffs are uncertain as to their rights and remedies under the Ormond Beach Land Development Code and Code of Ordinances, and under the Constitutions of the United States and the State of Florida.

96. Counter-Plaintiffs maintain that they operate a “bikini bar” which, by definition, is not subject to the CITY’s regulations pertaining to sexually oriented businesses.

97. Counter-Plaintiffs purchased the subject property and began operating the CHEATERS bikini bar prior to being annexed into the CITY.

98. Counter-Plaintiffs’ bikini bar format was consistent with Volusia County’s zoning ordinances and was fully licensed by Volusia County authorities.

99. Counter-Plaintiffs’ land use rights vested at the time it was licensed and approved by Volusia County.

100. Counter-Plaintiffs have not materially changed their format since CHEATERS opened on October 1, 2010.

101. The decision by ORMOND BEACH to annex Counter-Plaintiffs into the CITY cannot divest Counter-Plaintiffs of their vested property rights.

102. Counter-Plaintiffs maintain that they are entitled to the status of a lawful nonconforming use as their right to do business at their present location vested at a time when the CITY could not enforce its sexually oriented business laws against the Counter-Plaintiffs.

103. The laws of the State of Florida and the ORMOND BEACH Ordinances expressly provide for the continued maintenance of a use made nonconforming by later government action.

WHEREFORE, Counter-Plaintiffs pray for the following relief:

A. That this Court take jurisdiction over the parties and this cause;

B. That this Court enter a judgment declaring that Counter-Plaintiffs' business constitutes a lawful nonconforming use at their present location;

C. That this Court enter a judgment declaring that Counter-Plaintiffs' have vested property rights to operate a "bikini bar" at their present location;

D. That this Court enter a judgment declaring that the ORMOND BEACH land use regulations pertaining to sexually oriented businesses cannot be enforced against Counter-Plaintiffs so long as they maintain their status as a lawful nonconforming use.

E. That this Court award Counter-Plaintiffs all other relief in law and in equity to which it may be entitled.

COUNT III

CONDITIONAL USE REQUIREMENT - UNLAWFUL PRIOR RESTRAINT

104. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 74 of their Counterclaim as if fully set out herein.

105. The requirements and the procedures for receiving a conditional use permit are facially unconstitutional and act as an unlawful prior restraint in violation of the First Amendment to the United States Constitution.

106. Nowhere in ORMOND BEACH are sexually oriented businesses permitted as of matter of right; a conditional use permit is required for every adult use.

107. The discretionary criteria and procedures for granting of the requisite conditional use are unconstitutional and violative of the First Amendment. *See, FW/PBS, supra; See, also, Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999).

108. The substantive standards for issuance of a conditional use permit to a sexually oriented business include criteria specific to adult businesses [Chapter 2, Article IV, “Conditional Uses and Special Exception”, Section S(2)] as well as general criteria which apply to all applicants [Chapter 2, Article IV, Section 2-56].

109. The conditional use criteria which are specific to adult businesses include objective standards such as distance requirements as well as other criteria which are so indefinite and vague as to confer unfettered discretion on the reviewing officials. Those criteria which are not ministerial and allow for impermissible discretion include the following:

A. S(2)–7 provides that: “There shall be no public display of explicit materials on signs or as window displays.”. The term “explicit” is not defined in the Code and is not limited to materials which are legally obscene. This undefined term allows the permitting official to reject an application which includes materials which are entirely lawful but which the official subjectively deems to be “explicit”.

B. S(2)–9 provides that “A sexually oriented business shall possess a Sexually Oriented Business Use Permit signifying a determination from the Planning Department that the location for the sexually oriented business establishment complies with the location standards for such use.” However, as will be seen below, the standards for issuance of a Sexually Oriented Business Use Permit under §12-410 are themselves unconstitutional. This requirement is also unconstitutionally burdensome as the same determination of compliance with setback requirements must be made for the conditional use application; the conditions are unnecessarily duplicative.

110. Most of the §2-56 conditional use criteria which apply to all applicants (including sexually oriented businesses) are so indefinite and vague as to confer unfettered discretion on the reviewing officials. Those criteria which are not ministerial and allow for impermissible discretion include the following:

A. Section 2-56-A: Off-Street Parking does not list specific numbers or sizes of parking spaces but utilizes a completely arbitrary and subjective standard of “no adverse impact on adjoining properties”.

B. Section 2-56-B: Landscaping contains no specific criteria whatsoever: “[L]andscaping shall be consistent with the district in general, the specific needs of the abutting land uses, Chapter 3, Article 1, and other applicable provisions of this Code.”

C. Section 2-56-C: “Size, Location, or Number of Conditional and Special Exceptions” allows the decisionmaker to reject any conditional use if he believes there are too many such uses in the community: “Size, location, or number of conditional and special exceptions in an area shall be limited so as to maintain the overall character of the district in which said conditional or special exceptions are located.”

D. Section 2-56-D: “Hours of operation” is not limited to hours of operation, but allows the decisionmaker to place any other conditions or require any additional information that he believes may be relevant “to assure the compatibility of the development with existing and proposed uses in the surrounding area.”. Even the authority to regulate hours of operation is completely unrestricted and left to the official’s discretion: “For instance, hours of operation may

be restricted to avoid potential adverse impacts on a conforming residential use or on an adjacent residential district.”

111. Chapter I, Article III, Section 1-18-F(1) of the Ormond Beach Code also allows the City Commission to attach any other conditions it deems appropriate at the time of the public hearing:

1. The City Commission may include additional reasonable and appropriate conditions not specifically provided for in this Code where such conditions are necessary and appropriate to assure compliance with the Comprehensive Plan.

There are no limits placed on what is deemed “necessary and appropriate” and such unbridled grants of authority are universally stricken as unconstitutional in a First Amendment context.

112. The authority of the City Commission to attach additional conditions in its unfettered discretion is further emphasized in Chapter I, Article IV, Section 2-55-C of the Ormond Beach Land Development Code:

- C. Final Site Plan Application. A conditional or Special Exception shall be subject to approval of a final site plan that reflects compliance with the special development criteria and conditions contained in this article, *as well as other conditions established by the City Commission.* (emphasis added).

113. The vague, arbitrary and unconstrained grants of authority to the permitting officials make the ORMOND BEACH conditional use requirement unconstitutional as applied to sexually oriented businesses.

114. In addition to the failure to provide the requisite substantive protections, the Ormond Beach Land Development Code fails to provide the procedural guarantees required by

FW/PBS, *supra*. In particular, the Ordinance fails to guaranty that the conditional use process will result in a final administrative determination within a specified brief period of time.

115. As noted above, there are significant ambiguities as to the proper procedures applicable to conditional use applications. It appears most likely that conditional use applications must be considered and approved by the City Commission as Chapter I, Article IV, Section 2-55-B of the Ormond Beach Land Development Code specifies that procedure. To be precise, that section of the Land Development Code states that “[t]he procedures for notice, review and approval shall be as set forth in Chapter 1, Article II. Chapter 1, Article II then specifies the notice and public hearing requirements for development orders, special exceptions and other applications. Those procedures envision a hearing before the Planning Commission followed by a separate hearing before the City Commission.

116. The hearing procedures under Chapter 1, Article II are constitutionally inadequate for the following reasons:

A. There is no requirement that the Planning Commission schedule a public hearing within any specific time after the application for a conditional use is filed. The Planning Commission can effectively deny an application or delay it indefinitely simply by failing to schedule the matter for hearing.

B. There is no requirement that the Planning Commission actually render a decision within any specified time, brief or not. The Planning Commission can avoid a decision indefinitely by repeatedly continuing the hearing or by simply failing to take a vote on the application.

C. Because Planning Commission review is required before the City Commission may act on an application [Chapter I, Article III, Section 1-18(B): “The City Commission shall hold a public hearing following Planning Board consideration of applications...”], a delay before the Planning Commission will cause indefinite delay before the City Commission.

D. Even when an application comes before the City Commission there is no guarantee of a prompt decision. Again, there is no requirement in the Code that the City Commission actually conduct a hearing within a specified brief period of time.

E. Likewise, there is no guaranty that the City Commission will actually render a decision within any particular period of time even if it has conducted the hearing (*i.e.*, there is no requirement that the Commission take a vote at the conclusion of the hearing).

117. The Ordinance also fails to guaranty that the applicant will be allowed to engage in his chosen speech activity if a prompt decision is not made. The Ordinance must specify on its face that the conditional use permit is granted, or that the speech may occur in the absence of a permit, if the government fails to render a timely decision.

118. The Ordinance also fails to guaranty prompt judicial review of licensing decisions because there are insurmountable administrative obstacles to judicial review. In particular, Counter-Plaintiffs alleges the following:

A. Judicial review is necessarily delayed by the fact that the decision whether to grant or deny a conditional use application can be indefinitely delayed; without a final decision, there is no exhaustion of administrative remedies and no ability to seek judicial review.

B. For all decisions by staff and by the Planning Commission, Chapter 1, Article II, Section 1-19 requires that the applicant appeal to the City Commission before seeking judicial review:

B. Procedures for Appeal

1. **Appeal of Interpretations and Decisions of the Planning Director.** Any interpretation and determination of the Planning Director of the Land Development Code shall be appealed to the City Commission.

...

3. **Appeal of Actions by Planning or Development Review Boards.** Except as provided in Subsection C.3 below, appeals to Land Development Code decisions by the Planning Board shall be made to the City Commission.

That requirement imposes an additional layer of administrative review which delays the possibility of effective and timely judicial review.

C. The procedures for conducting the hearing before the City Commission are set forth in Chapter 1, Article II, Section 1-19-C-3.

3. **Hearing of Appeal; Notice Required.** Within 30 days of receipt of appeal, the Planning Board and the City Commission, respectively, shall set a reasonable time for the hearing of the appeal, give public notice thereof, due notice to the parties in interest and decide the same within a reasonable time.

119. Those procedures are constitutionally inadequate for the following reasons:

(1) The Ordinance does not require that a hearing be held within the nominal 30 days. Rather, the Clerk is only required to make the decision as to when the hearing

will be conducted within the 30 day period. Thus, the Clerk can wait until the 30th day to pick a hearing date and the date itself can be some unspecified “reasonable time” in the future.

(2) The requirement that the administrative appeal will be heard within “a reasonable time” is not the equivalent of a *specified*, brief period of time.

(3) The requirement that a decision will be made “within a reasonable time” is not the equivalent of a *specified*, brief period of time.

(4) The Ordinance does not specify what happens if the Clerk fails to schedule a hearing within a reasonable time, if the City Commission fails to conduct the hearing within a reasonable time, or if the City Commission fails to actually make a decision within a reasonable time after conducting the hearing.

120. It is possible that, notwithstanding the provisions of Chapter I, Article IV, Section 2-55-B, the City does not submit conditional use applications to the Planning Commission and the City Commission, but evaluates such applications at the staff level.

121. If that is the case, the conditional use permitting system still fails to provide the necessary procedural protections as there are no procedures or time standards in the Land Development Code relative to staff review of conditional use applications.

122. In the absence of any defined procedures or deadlines, there is no guaranty that City staff will act on a conditional use application within any period of time, brief or otherwise. Furthermore, there are no provisions in the Code that allow the applicant to force a staff determination within any specified time period. In addition, there is no guaranty that the speech

activity will be allowed in the absence of a conditional use permit if staff fails to act on an application within a brief period of time.

123. In short, staff review of conditional use applications is at the complete and unfettered discretion of unnamed bureaucrats with no deadlines and no means of further administrative or judicial review.

124. It is possible that the City will refer to the procedures set forth in Chapter 12, Article XIV, Division 4, §12-410 of the Ormond Beach Code of Ordinances as a surrogate or default procedure for the review of conditional use applications submitted by sexually oriented businesses. However, such a construction is unreasonable given the fact that §12-410 is not part of the Land Development Code and, instead, concerns itself with the licensing procedures for sexually oriented businesses. Furthermore, §12-410 requires a fee separate from any fee submitted for a conditional use permit, which suggests an intent to establish entirely separate procedures. In addition, the procedures for appeal of §12-410 denials are entirely different from the procedures established under the Land Development Code. *See*, 12-411 (Providing for an administrative appeal to the Board of Adjustment under a hybrid review similar – but not identical - to that for a variance request). Finally, §12-410 requires the applicant to provide information which is both different from and supplemental to the materials which must be submitted for review of conditional use applications.

125. Even if §12-410 is found to provide procedures for the consideration of conditional use applications by sexually oriented businesses, those procedures are constitutionally inadequate.

126. The procedures for review of §12-410 permit applications are as follows:

Sec. 12-410. - Sexually oriented business permits and licenses.

...

(c) *Inspection and issuance of certificate.* Upon receipt of a completed application, a planning department staff person shall inspect the proposed location of the sexually oriented business to determine compliance with the conditional uses of a permitted sexually oriented business establishment and, within ten (10) working days, issue a written compliance determination. The planning department may extend that period of time for purposes of clarification of issues raised by the review; but, in no event, for a period of time in excess of twenty (20) additional days.

127. The 10 to 20 day review period provided by §12-410(c) is illusory because it does not guaranty that the speech activity will be permitted if the staff fails to act within the nominal deadline. As is the case for all licensing measures affecting speech rights, the ordinance must state on its face the consequences of a failure to act within the specified time. In particular, the ordinance must state that the applicant is either automatically issued the requisite license or that he is allowed to conduct his speech activities in the absence of a permit. Section §12-410(c) lacks those provisions.

128. Section §12-410 does not provide for prompt judicial review in the event of a denial of the conditional use application. Section §12-410 specifies that review will be in accordance with §12-411. Section 12-411 does not provide for immediate judicial review. Instead review is before the Ormond Beach Board of Adjustment, an administrative body. The administrative appeal does not include internal time limits so that judicial review may be delayed indefinitely. Counter-Plaintiffs allege the following particulars:

(1) There is an irreconcilable conflict between the procedures specified for Board of Adjustment hearings under the Land Development Code [Chapter 1, Article II,

Section 1-16-C] and those specified by §12-411 of the Code of Ordinances. Both the public notice and hearing procedures differ dramatically.

(2) Assuming that the §12-411 procedures control (because they are specific to sexually oriented businesses), they are constitutionally inadequate for the following reasons:⁴

(a) The nominal sixty day (60) time period for setting a hearing is not sufficiently brief.

(b) The Ordinance does not require that a hearing be held within the nominal 60 days. Rather, the planning department is only required to make the decision as to when the hearing will be conducted within the 60 day period. Thus, the planning department can wait until the 60th day to pick a hearing date and the date itself can be at any unspecified time in the future.

(c) The Ordinance does not specify what happens if the planning department fails to schedule a hearing, if the Board of Adjustment fails to conduct the hearing within a reasonable time, or if the Board of Adjustment fails to actually make a decision within a reasonable time after conducting the hearing.

⁴ The general procedures applicable to variances and other matters before the Ormond Beach Land Development Code fail constitutional requirements for much the same reasons: there is no specified period of time within which the hearing must be held, no guaranty that a decision will be made within any brief period of time, and no guaranty of speech should the Board fail to render a timely decision. Those same procedural inadequacies also make prompt judicial disposition impossible because there can be no exhaustion of administrative remedies.

(d) The Board of Adjustment is afforded undue discretion. The principal determination made by the Board under §12-12-411(c)(1) is whether “a sufficient physical barrier separates the sexually oriented business establishment, for which a variance is being sought, from the land use(s) which has caused the sexually oriented business not to be in compliance with the distance requirement of this article”. The term “sufficient physical barrier” is undefined in the Code, has no commonly understood meaning, and does not confine the discretion of the Board.

129. In the case of a business which was already open and operating before the conditional use requirement was enforceable,⁵ the Land Development Code fails to preserve the *status quo ante* pending a judicial decision. Both the Land Development Code and the City’s Code of Ordinances contemplate that the business cease to operate once the conditional use application is denied.

130. The conditional use process is unconstitutional as applied to Counter-Plaintiffs because there are no locations in the entire City where an adult establishment can open and operate as a matter of right and the conditional use requirement imposes an unconstitutional prior restraint.

WHEREFORE, the Counter-Plaintiffs pray for the following relief:

A. That this Court take jurisdiction over the parties in this cause;

⁵ CHEATERS was already open and operating in unincorporated Volusia County before the property and business were annexed into the City of Ormond Beach.

B. That this Court enter an Order declaring the ORMOND BEACH conditional use procedures and criteria [Chapter 2, Article IV, Section S(2) and §2-29-D-18 of the City's Land Development Code] to be unconstitutional on their face and as applied to the Counter-Plaintiffs;

C. That this Court enter an Order declaring that the provisions governing conditional use permits are not severable from the CITY's remaining regulations governing sexually oriented businesses;

D. That this Court enter an Order permanently enjoining ORMOND BEACH and its agents from enforcing: (1) Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and (2) the entirety of Chapter 12, Article XIV of the Code of Ordinances, against the Counter-Plaintiffs and all other similarly situated persons.

E. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and

F. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT IV

INSUFFICIENT ALTERNATIVE AVENUES OF COMMUNICATION

131. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 74 of their Counterclaim as if fully set out herein.

132. ORMOND BEACH is a tourist-oriented community with a large transient population – particularly during special events in nearby Daytona Beach. The number of sites

available for sexually oriented businesses in ORMOND BEACH is not adequate for its year-round population, much less the demand for such entertainment during the tourist season.

133. The zoning and setback requirements for sexually oriented businesses are so restrictive that the CITY has created an effective “zone out” as there are either no sites or an insufficient number of sites provided for adult businesses; that is, the CITY fails to provide alternative avenues of communication.

134. The number of sites available as a conditional use in the B-8 commercial zone is not constitutionally adequate.

135. The few sites available in the B-8 zone are further reduced by the setback requirements from “sensitive uses” such as churches and schools. Counter-Plaintiffs allege on information and belief that there are at least seventeen (17) public and private schools within the municipal boundaries of Ormond Beach and at least sixty-two (62) churches. Most of the B-8 zoning district lies in close proximity to residences and residentially zoned property. The net effect of the setback requirement is to reduce the few sites nominally available in the B-8 zone to a constitutionally insufficient number.

136. In addition to the setbacks from sensitive uses, the Ormond Beach Land Development Code includes a “self-disqualification” provision. That is, adult businesses must be located at least 500 feet from another sexually oriented business. *See*, Chapter II, Article IV, Section (S)-2-2, LDC. The location of a single adult use therefore disqualifies all surrounding properties within a radius of 500 feet. Counter-Plaintiffs assert that the application of the self-disqualification provision reduces the available sites for adult businesses to a single location.

137. As noted above, the Florida statutes prohibits adult businesses from locating within 2,500 feet of a public or private school. *See*, §847.0134, Fla.Stat. The Ormond Beach Land Development Code does not specifically waive the requirements of §847.0134 (*i.e.*, this jurisdiction has not taken advantage of the statutory “opt out” provision). When the effect of §847.0134 is considered, there are no sites in all of ORMOND BEACH which meet the zoning and setback requirements of the applicable laws.

138. There are an insufficient number of sites within Ormond Beach where adult businesses may have a reasonable opportunity to open and operate. That is, the City’s Land Development Code fails to provide alternate avenues of communication.

WHEREFORE, the Counter-Plaintiffs pray for the following relief:

- A. That this Court take jurisdiction over the parties in this cause;
- B. That this Court enter an Order declaring the ORMOND BEACH Land Development Code] to be unconstitutional on its face as applied to the Counter-Plaintiffs because it fails to provide alternative avenues of communication for sexually oriented businesses;
- C. That this Court enter an Order declaring that the Land Use provisions are not severable from the CITY’s remaining regulations governing sexually oriented businesses;
- D. That this Court enter an Order permanently enjoining ORMOND BEACH and its agents from enforcing: (1) its Land Development Code and (2) the entirety of Chapter 12, Article XIV of the Code of Ordinances, against the Counter-Plaintiffs and all other similarly situated persons.

E. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and

F. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT V

ADULT LICENSING PROVISIONS - UNLAWFUL PRIOR RESTRAINT

139. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 74 ____ and 104 through 130 of their Counterclaim as if fully set out herein.

140. A sexually oriented business must obtain three permits before it is permitted to open and operate:

A. A sexually oriented business license under Chapter 12, Article XIV, §12-395 of the ORMOND BEACH Code of Ordinances.

B. A sexually oriented business permit under Chapter 12, Article XIV, §12-410 of the ORMOND BEACH Code of Ordinances.

C. A business tax receipt (occupational license) under Chapter 12, Article XIV, §12-2, which is applicable to any business in the CITY.

141. As was explained above, a §12-410 sexually oriented business permit must be obtained before one can apply for a §12-395 sexually oriented business license.

142. The requirements and the procedures for both adult licenses - §12-410 and §12-395 - are facially unconstitutional and act as an unlawful prior restraint in violation of the

First Amendment to the United States Constitution. *See, FW/PBS, supra; Lady J. Lingerie, supra.*

143. Section 12-410 imposes a prior restraint because one cannot engage in free speech without first obtaining the required permit from the CITY.

144. At least one of the substantive criteria for review of §12-410 permits is unconstitutional. Section 12-410(b)(6) requires the approval of the landlord before one can obtain the necessary permit:

Sec. 12-410. - Sexually oriented business permits and licenses.

(b) *Required information.* In order to obtain a sexually oriented business permit, the applicant shall provide... the following information:

...

(6) If the applicant is not the record owner of the subject parcel, the application must include a letter, with the notarized signature of the record owner, purporting to be the record owner, and stating that the applicant is authorized to seek a sexually oriented business permit for the premises.

145. The requirement that a third party approve of the license application is a prior restraint and allows the landlord an unconstitutional “heckler’s veto” over Counter-Plaintiffs’ speech rights.

146. The requirement of a letter from the landlord and the requirement that the letter be notarized serve no legitimate governmental interest and are a substantial and unnecessary burden on Counter-Plaintiffs’ speech rights.

147. The procedures for approval of sexually oriented business permits under §12-410 are unconstitutional. Counter-Plaintiffs alleges the following particulars:

A. The 10 to 20 day review period provided by §12-410(c) is illusory because it does not guaranty that the speech activity will be permitted if the staff fails to act within the nominal deadline. As is the case for all licensing measures affecting speech rights, the ordinance must state on its face the consequences of a failure to act within the specified time. In particular, the ordinance must state the applicant is either automatically issued the requisite license or that he is allowed to conduct his speech activities in the absence of a permit. Section §12-410(c) lacks those provisions.

B. Section §12-410 does not provide for prompt judicial review in the event of a denial of the conditional use application. Section §12-410 specifies that review will be in accordance with §12-411. *See*, §12-410(c)(1)b (“Upon receipt of the certification of noncompliance, the applicant shall have ten (10) days to appeal the decision on noncompliance pursuant to the provisions of section 12-411 below.”).⁶

C. Section 12-411 does not provide for immediate judicial review. Instead review is before the Ormond Beach Board of Adjustment, an administrative body.

Sec. 12-411 - Relief.

⁶ The referral by §12-410(c)(1)b to the Board of Adjustment for proceedings under §12-411 appears to conflict directly with §12-413(a) which provides that “[t]he city commission shall have the authority to hear appeals from interpretations and determinations of the planning director of the Land Development Code and Code of Ordinances, where applicable.” Counter-Plaintiffs’ claims do not depend upon the proper resolution of this conflict because the procedures for review before the City Commission are also unconstitutional for failure to comply with FW/PBS.

(a) *Applicant's authority to file for relief.* If an applicant receives a noncompliance determination because the location of the proposed sexually oriented business is in violation of the locational requirements of the Land Development Code, then the applicant may, not later than ten (10) calendar days after receiving a determination of noncompliance, file with the planning department a written request for a relief from the locational restrictions of the Land Development Code.

(b) *Hearing before board of adjustment and appeals.* If the written request is filed with the planning department within the ten-day limit, a hearing shall be scheduled before the city board of adjustment and appeals which body shall consider the request for a hardship relief. The planning department shall set a date for the hearing within sixty (60) days from the date the written request is received.

148. The administrative appeal does not include internal time limits so that judicial review may be delayed indefinitely. Counter-Plaintiffs allege the following particulars:

(1) The nominal sixty day (60) time period for setting a hearing is not sufficiently brief.

(2) The Ordinance does not require that a hearing be held within the nominal 60 days. Rather, the planning department is only required to make the decision as to when the hearing will be conducted within the 60 days period. Thus, the planning department can wait until the 60th day to pick a hearing date and the date itself can be at any unspecified time in the future.

(3) The Ordinance does not specify what happens if the planning department fails to schedule a hearing, if the Board of Adjustment fails to conduct the hearing within a reasonable time, or if the Board of Adjustment fails to actually make a decision within a reasonable time after conducting the hearing.

(4) The Ordinance does not specify any of the substantive criteria to be employed in determining whether a “hardship” exists.

149. Even if the staff concludes that the applicant meets all of the zoning requirements, there is no express guaranty that the planning director will actually issue the §12-410 permit. Rather, the only specific requirement stated in the code is that the staff shall notify the applicant that he has been approved. *See*, §12-410(c)(2)A.

150. The Code does not state that issuance of the permit is mandatory after compliance is acknowledged by staff. The failure to state that a permit *shall* issue renders the permitting scheme unconstitutional *See*, Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994).

151. As written the Ordinance places the burden of obtaining the physical permit from the planning director on the applicant. The Ordinance does not specify what happens if the planning director declines to issue the permit within the nominal twenty day period:

§12-410

...

c. Upon notification, the applicant shall have twenty (20) days to obtain the sexually oriented business permit, signed by the planning director or his designee. Failure to obtain that permit within the twenty-day time period invalidates the determination of compliance and the applicant must reapply.

152. The requirement that the applicant physically obtain the license and risk of forfeiture if he does not, is an unreasonable burden on speech and serves no legitimate governmental purpose. Rather, the license should issue immediately as a matter of course once staff finds compliance with the applicable codes.

153. The prior restraint imposed by §12-410 is exacerbated by the need to obtain a second discretionary permit from the CITY: the §12-395 sexually oriented business license.

154. Delay in issuing a §12-410 permit necessarily delays the issuance of a §12-395 sexually oriented business license because one cannot obtain – or even apply for a §12-395 license without first obtaining the §12-410 permit.

155. Section 12-395 also imposes a prior restraint because one may not open a sexually oriented business without first obtaining that license.

156. Certain of the informational disclosures are vague and impose an unreasonable burden on speech. Counter-Plaintiffs allege the following particulars:

A. Section 12-396(b)(10) requires the applicant to submit a site plan of the proposed establishment which it describes as “[a] professionally prepared diagram in the nature of an engineer's or architect's blueprint”. That requirement is unconstitutional for the following reasons:

(1) The term “professionally prepared diagram” is vague and allows the permitting official the unfettered discretion to determine what is and is not “professional”. While it appears that a sealed engineer’s or architect’s blueprint is sufficient, the Ordinance suggests that other “professionally prepared diagrams” are adequate as well. However, no guidance is provided as to what other diagrams might suffice.

(2) The expense of preparing a diagram showing all of the specified features “to an accuracy of plus or minus six (6) inches” is an unreasonable burden on speech without a countervailing government interest.

B. Section 12-396(b)(10) requires the applicant to provide his social security number. This requirement is unnecessary for identification purposes in light of the

requirement that an applicant provide his driver's license. The social security requirement also unnecessarily infringes upon privacy rights without adequate guarantees that the information will be protected from public disclosure.

C. The requirement under § 12-396(b)(13) for some form of picture identification is both vague and unnecessarily restrictive. Because not every citizen has a driver's license, it is incumbent upon the City to specify what alternate forms of identification would suffice. The term "state or federally-issued identification card number" is undefined and has no commonly understood meaning. It is unclear whether common forms of Federal identification such as a military ID, passport or Medicare card would suffice for these purposes.

D. Section 12-398(c)(1)b allows the planning department to deny a license if a previous license in another jurisdiction "has been suspended or revoked for reasons implicating the purposes and intent of these regulations". The term "implicating the purposes and intent of these regulations" is not defined in the Code, has no commonly understood meaning and grants unfettered discretion to the permitting officials.

157. In deciding whether to grant or deny a license, Section 12-398(c)(1)c allows the permitting official to pick and choose from applicable laws in his unfettered discretion. That section instructs the official to deny a license if:

- c. The granting of an application would violate a statute, ordinance, or an order from a court of law;

That form of discretion has been condemned as unconstitutional for nearly a decade. *See,*

Fly Fish v. Cocoa Beach, 337 F.3d 1301, 1312 (11th Cir. 2003) ("Striking license provision which allowed denial of an adult license "the granting of the application would violate either a

statute or ordinance or an order from a Court of law that effectively prohibits the applicant from obtaining an adult entertainment establishment license.”).

158. Before the planning staff can make a decision on a §12-395 license, the application must first be routed to the police department for review:

Sec. 12-397. - Investigation of application.

Upon receipt of an application properly filed with the planning department and upon payment of the nonrefundable application fee, the planning department shall immediately stamp the application as received and shall immediately thereafter send photocopies of the application to the police department. The police department's representatives shall promptly conduct an investigation of the applicant, and of the individuals listed in the application pursuant to subsection 12-396(b)(3) to ascertain the validity of the information provided, as well as other information provided in the application. At the conclusion of its investigation, the police department shall indicate, on the photocopy of the application, the results of its investigation.

159. There is no specified time within which the police department is required to conduct its investigation; the nominal admonition that the review be “prompt” is constitutionally inadequate.

160. The Ordinance does not specify what happens if the police department fails to make a prompt decision. The planning staff is not specifically authorized to issue a sexually oriented business license in the absence of a report from the police department.

161. The Ordinance provides a separate review procedure by the planning department:

Sec. 12-398. - Grant; denial.

(a) *Time period for granting or denying.* The planning department shall grant or deny an application for a license within thirty (30) calendar days from the date of its proper filing. Upon the expiration of the thirtieth (30th) day, the applicant may be permitted to begin operating the establishment for which a

license is sought, without benefit of a license, unless and until the planning department notifies the applicant of a denial of the application and states the reason(s) for that denial. Failure to timely grant or deny an application for a license, and the provisions of this section allowing operation without benefit of a license, shall not serve as a granting of the license, but shall serve to ripen an appropriate action to compel a decision on the application. All operation of the establishment, under this special provision, shall conform to the provisions of divisions 4 and 5 of these regulations during the pendency of the application review.

162. The time standards for review of the §12-395 license are illusory for at least three reasons:

A. Under controlling law, the conditional granting of a license subject to later revocation [“unless and until the planning department notifies the applicant of a denial of the application”] is constitutionally inadequate. *See, Fly Fish*, 337 F.3d at 1312-13.

B. Furthermore, the statement that “the applicant may be permitted to begin operating the establishment for which a license is sought” is constitutionally deficient. The ordinance must make the right to operate mandatory with the conclusive word “shall” and not the permissive word “may”. *See, Redner v. Dean, supra*.

C. Under §12-396(d), the planning department can derail and delay the processing of an application by determining “at any time” that the application is incomplete. Nor is there any limitation on the number of times that the planning department can make this determination:

(d) Incomplete application. In the event the planning department determines, or learns at any time, that the applicant has not properly completed the application for a proposed establishment, the department shall promptly notify the applicant of such fact and shall allow the applicant ten (10) working days to properly complete the application. The time period for granting or denying a license under section 12-398 shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.

Because a finding of incompleteness suspends the proceedings (and the time period for a decision) for as long as 10 days on each occasion, the planning department has the ability to indefinitely delay any application.

D. The statement that the failure of the government to make a decision within thirty (30) days “shall not serve as a granting of the license” is the exact opposite of constitutional requirements. Upon the failure of government to act promptly, the government *must* either issue the license or the applicant must be permitted to engage in speech activities without a license. In either case, that right is vested and not conditional. *See, Lady J. Lingerie, Inc. v. City of Jacksonville, supra; Fly Fish, supra.*

163. Section 12-395 fails to provide for a prompt judicial disposition. The Ordinance contemplates only an action to force a decision of some kind (which, if adverse, would require a separate appeal, thereby delaying judicial review and preventing prompt judicial disposition).

164. The §12-395 sexually oriented business license appears in Division 2 of Article XIV of the CITY’s Code. There are no provisions in Division 2 which provide for an appeal from an adverse licensing decision by the police or planning staff.

165. The lack of a defined appeals process would render the Ordinance unconstitutional because it would allow for a final prior restraint to be imposed by administrators without judicial review.

166. However, there appears to be a general appeals provision in Division 5 of Article XIV which allows an unsuccessful applicant to appeal to the City Commission⁷

Sec. 12-413. - Appeals.

(a) The city commission shall have the authority to hear appeals from interpretations and determinations of the planning director of the Land Development Code and Code of Ordinances, where applicable.

167. Chapter 12, Article XIV does not include any provisions regarding how appeals to the City Commission are to be conducted.

168. To the extent such appellate procedures are lacking, the Ordinance is unconstitutional because the appeal would necessarily follow arbitrary rules with no criteria to guide the decisionmaker. Furthermore, the failure to guarantee a decision within a specified, brief period of time would violate the FW/PBS requirements. Likewise, the failure to provide for prompt judicial disposition would render the Ordinance unconstitutional.

169. It is possible that the City Commission would adopt those review proceedings which apply to other land use issues. *See*, Chapter 1, Article II. However, those proceedings are also constitutionally deficient because they do not guarantee a prompt hearing, a prompt decision or prompt access to the Courts. Furthermore, the appeal would employ substantive criteria for conditional uses which are unconstitutionally vague and vest unfettered discretion in the hands of the permitting authority.

⁷ As noted in Count III above, the City's adult ordinance is often unclear as to what appellate remedies, if any, are available for the multitude of licenses and approvals. For instance, §12-413(c) discusses the procedure for appeals from the Board of Adjustment. It is uncertain what adult licensing matters would ever go before the Board of Adjustment, with the possible exception of denials of the §12-410 sexually oriented business permit.

170. The conflicting and irreconcilable provisions for review and appeal render the entirety of Chapter 12, Article XIV unconstitutionally vague and unenforceable.

171. License revocations also act as prior restraints and must provide the same procedural protections afforded license applications.

172. Chapter 12, Article XIV, Section 12-404 of the Ormond Beach Code of Ordinances governs the suspension of sexually oriented business licenses:

Sec. 12-404. - Suspension of license.

(a) Violation of general provisions.

(1) In the event a department learns or finds upon sufficient cause that a licensed sexually oriented business establishment is operating contrary to the respective general requirements of subsections 12-407(e) through (h), or the applicable special requirements of sections 12-408 and 12-409, the planning department shall promptly notify the licensee of the violation and shall allow the licensee a ten-day period, from the date of mailing the certified notice, in which to correct the violation. ...

(2) If the licensee fails to so correct the violation before the expiration of the time period provided in subsection 12-404(a)(1) above, the department shall notify the planning department, who shall forthwith suspend the license, and shall notify the licensee of the suspension.

(3) The suspension shall remain in effect until the department notifies the planning department in writing that the violation of the provision in question has been corrected....

...

(5) During the suspension of its license, a sexually oriented business establishment may not operate as a sexually oriented business or, pursuant to other applicable codes, ordinances, statutes, or court orders, where applicable, may not be open for business.

173. The license suspension proceedings are unconstitutional in multiple respects:

A. The standard for revocation based on material false information is stated as “learns, or finds upon sufficient cause”. That criteria is vague and standardless and does not meet minimum due process requirements [a minimum evidentiary standard of competent, substantial evidence].

B. The Ordinance fails to preserve the *status quo* pending judicial review. Section 12-404(d) allows for the immediate suspension of the license by staff and the loss of speech rights prior to any judicial review of the licensing decision.

174. Chapter 12, Article XIV, Section 12-405 of the ORMOND BEACH Code of Ordinances governs revocation of sexually oriented business licenses:

Sec. 12-405. - Cancellation or revocation of license.

(a) False information. In the event the planning department learns, or finds upon sufficient cause, that a license was granted based upon material false information, misrepresentation of material fact, or mistake of fact or law, it shall forthwith cancel the license, and notify the licensee of the cancellation...

(b) Convictions for violations of division 5 of these regulations.

(1) In the event that one or more convictions for a specified criminal act and/or a conviction for violation of division 5 of these regulations of either the licensee, the licensee's operator or employee, or of any of the other individuals listed pursuant to subsection 12-396(b)(1), occur at a sexually oriented business establishment which has had a license suspended for a period of one hundred eighty (180) days pursuant to subsection 12-404(c)(3), and the conviction(s) occurs within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for one hundred eighty (180) days, but not including any time during which the license was suspended for one hundred eighty (180) days, the planning department shall forthwith revoke the license, and notify the licensee of the revocation.

175. The license revocation proceedings are unconstitutional in multiple respects:

A. The revocations occur without a pre-deprivation hearing and without prior notice to the license holder in violation of basic principles of due process. *See, Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95 (1972).

B. The standard for revocation based on material false information is stated as “learns, or finds upon sufficient cause”. That criteria is vague and standardless and does not meet minimum due process requirements [a minimum evidentiary standard of competent, substantial evidence].

C. Revocations based on criminal convictions on the premises are not limited to crimes committed by the license holder or management level employees. The Ordinance imposes vicarious liability without a showing of responsible relationship in violation of the Due Process Clause of the Fourteenth Amendment. *See, Lady J. Lingerie*, 176 F.3d at 1367-69; *Rameses, Inc. v. County of Orange*, 481 F. Supp. 2d 1305, 1326-27 (M.D. Fla. 2007).

D. The Ordinance fails to preserve the *status quo* pending judicial review. Section 12-405(d) allows for the immediate revocation of the license by staff prior to any judicial review of the licensing decision:

(d) Effective date of revocation. The revocation shall take effect five (5) days after the date the planning department mails by certified mail the notice of revocation to the licensee, or on the date the licensee surrenders his license to the planning department, whichever happens first.

E. The Ordinance fails to provide for judicial review of any kind.

176. Section 12-399 of the Code allows for sexually oriented business licenses to be “summarily” canceled in the event of non-payment:

Sec. 12-399. - Contents of license; term of license; renewals; expiration; cancellation.

(e) Cancellation. All expired licenses not renewed by November 30 shall be canceled summarily by the planning department.

That provision is unconstitutional in the following respects:

- A. The Ordinance does not preserve the *status quo* pending judicial review.
- B. The Ordinance does not provide for notice or a pre-deprivation hearing in violation of due process.
- C. Other business licenses in the community are not subject to summary cancellation; instead a tardy business owner simply pays an additional fee as a penalty in the event of a late submission. The discriminatory treatment of sexually oriented businesses violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, the Counter-Plaintiffs pray for the following relief:

- A. That this Court take jurisdiction over the parties in this cause;
- B. That this Court enter an Order declaring that the requirements for a §12-410 sexually oriented business permit and a §12-395 sexually oriented business license, together with the associated procedures for granting, suspending and revoking those permits, are unconstitutional on their face and as applied to the Counter-Plaintiffs;
- C. That this Court enter an Order declaring that the provisions governing sexually oriented business license and permits are not severable from the CITY's remaining regulations governing sexually oriented businesses;

D. That this Court enter an Order permanently enjoining ORMOND BEACH and its agents from enforcing: (1) Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and (2) the entirety of Chapter 12, Article XIV of the Code of Ordinances, against the Counter-Plaintiffs and all other similarly situated persons.

E. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and

F. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT VI

OTHER UNCONSTITUTIONAL PROVISIONS OF CHAP. 12, ART. XIV

177. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 74 of their Counterclaim as if fully set out herein.

178. Numerous other provisions of Chapter 12, Article XIV of the ORMOND BEACH Code of Ordinances are unconstitutional and unenforceable singly or in combination with other portions of the Code.

Overbroad Dance Restrictions

179. Section 12-392 of the Ormond Beach Code of Ordinances includes the following definition as part of what it terms "*specified sexual activities*":

(3) Fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast; or

180. The definition is then used in part to define sexually oriented businesses. The definition is also included within various prohibitions in the adult code. *See, e.g.*, §12-412(c)(1)

(making it illegal to “engage in any specified sexual activity as defined in section 12-392”). Violations of the law based on that definition can be used to suspend or revoke sexually oriented business licenses. *See, e.g.*, §§12-404 and 12-405(b).

181. The definition, and the application of the definition, is content-based as it focuses specifically on erotic touching, which is almost a defining characteristic of exotic dance performances.

182. The definition, and the application of the definition, is overbroad because it includes not only acts within the legitimate sweep of governmental regulation [lewd acts], but also a wide variety of dance and dance moves which are protected by the First Amendment.

183. Section 12-392 is not narrowly tailored because it is not confined to touching between performers and patrons, but would even include touching conducted by a performer on her own body in the course of a performance.

184. An almost identical definition of “specified sexual acts” was declared unconstitutional in Rameses, Inc. v. County of Orange, 481 F. Supp. 2d at 1318-22.

Vicarious Liability without Responsible Relationship

185. The Ormond Beach adult code does not include a provision specifying the penalty for violation of the Code. However, numerous actions and failures to act are deemed “violations” of the Ordinance.

186. Chapter I, Section 1-9 of the Ormond Beach Code of Ordinances specifies the penalties for a violation of the CITY Code:

Sec. 1-9. - General penalty; continuing violations.

Whenever in this Code, or in any ordinance of the city, any act is prohibited or is made or declared to be unlawful or an offense or misdemeanor, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, and no specific penalty is provided therefor, the violation of any such provision of this Code, or any such ordinance shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment for not exceeding sixty (60) days, or by both such fine and imprisonment, at the discretion of the court. Each day any violation of this Code or any such ordinance of the city shall continue shall constitute a separate offense.

187. Section 12-412(c) of the Ormond Beach Code of Ordinances makes licensees and operators of sexually oriented businesses responsible for the criminal violations of other employees (including performers):

Allowing employee(s) to engage in prohibited acts. It shall be a violation of these regulations for any business entity, licensee, or for any operator of a sexually oriented business establishment, regardless of whether licensed under these regulations, to knowingly or with reason to know, permit, suffer, or allow any employee [to commit those acts listed in subsections 1 through 10].

188. That Code provision provides that a violation may be established on a showing of mere negligence (“or with reason to know”). As noted above, a violation of the Code subjects the citizen to possible incarceration pursuant to Chapter I, Section 1-9.

189. It is a violation of due process to incarcerate a citizen without a showing of *mens rea* (i.e., a showing of knowledge or reckless conduct). Negligent acts are insufficient to incarcerate a citizen for the criminal acts of others.

190. The ORMOND BEACH Code of Ordinances also allows for the incarceration of persons who are not in a “responsible relationship” with respect to the person committing the crime.

191. Section 12-392 defines the word “operator” for purposes of the CITY’s adult entertainment regulations:

Operator means any person who engages in, or performs any activity which is necessary to, or which facilitates the operation of a sexually oriented business establishment, including but not limited to, the licensee, manager, owner, doorman, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, employee, or supervisor. This term is not meant to include repairmen, janitorial personnel, or the like, who are only indirectly involved in facilitating the operation of the sexually oriented business.

192. Operators are not restricted to owners or those having direct managerial control over dance performances. Instead, the Ordinance allows for the incarceration of any employee, including “bartenders”, “sales clerks” and “ticket takers” for the criminal actions of other employees over whom they exercise no control.

193. It is a violation of due process to incarcerate a citizen without a showing that the person was in a “responsible relationship” with respect to the person committing the crime. *See, Lady J. Lingerie*, 176 F.3d at 1367-69.

194. The suspension and revocation provisions of the CITY’s adult entertainment ordinance violates the Due Process Clause for much the same reasons.

195. Chapter 12, Article XIV, Section 12-404 of the Ormond Beach Code of Ordinances allows for the suspension of sexually oriented business licenses based on the criminal acts of any third parties on the premises:

Sec. 12-404. - Suspension of license.

...

(c) Convictions for violations of division 5 of these regulations.

(1) In the event that three (3) or more violations of a specified criminal act and/or violations of division 5 of these regulations occur at a

sexually oriented business establishment within a two-year period, and convictions result from at least three (3) of the violations of either the licensee, the licensee's operation or employee, or of any of the other individuals listed pursuant to subsection 12-396(b)(1), the planning department shall, upon the date of the third conviction, suspend the license, and notify the licensee of the suspension. The suspension shall remain in effect for a period of thirty (30) days.

(2) In the event that one (1) or more violations of a specified criminal act and/or violations of division 5 of these regulations occur at the sexually oriented business establishment within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for thirty (30) days under subsection 12-404(c)(1), but not including any time during which the license was suspended for thirty (30) days, and a conviction results from one or more of the violations, of either the licensee, the licensee's operator or employee, or of any of the other individuals listed pursuant to subsection 12-396(b)(1), the planning department shall, upon the date of the first conviction, suspend the license again, and notify the licensee of the suspension. The suspension shall remain in effect for a period of ninety (90) days.

(3) In the event that one (1) or more violations of a specified criminal act and/or violations of division 5 of these regulations occur within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for ninety (90) days under subsection 12-404(c)(2), but not including any time during which the license was suspended for ninety (90) days, and a conviction results from one (1) or more of the violations, of either the licensee, the licensee's operator or employee, or of any of the other individuals listed pursuant to subsection 12.396(b)(1), the planning department shall, upon the date of the first conviction, suspend the license again, and notify the licensee of the suspension. The suspension shall remain in effect for a period of one hundred eighty (180) days.

196. The criminal acts which “count” for purposes of license revocations are not limited to those carried out by management-level staff, or even by employees of the business. Rather, the only requirement is that some “specified criminal act” occurred on the property.

Thus, the conviction of a patron - or even a trespasser - would place a business' license at risk of revocation.

197. Likewise, §12-405 of the Ormond Beach Code of Ordinances allows for the revocation of sexually oriented business licenses based on the criminal acts of third parties which occur on the property:

Sec. 12-405. - Cancellation or revocation of license.

....

(b) *Convictions for violations of division 5 of these regulations.*

(1) In the event that one or more convictions for a specified criminal act and/or a conviction for violation of division 5 of these regulations of either the licensee, the licensee's operator or employee, or of any of the other individuals listed pursuant to subsection 12-396(b)(1), occur at a sexually oriented business establishment which has had a license suspended for a period of one hundred eighty (180) days pursuant to subsection 12-404(c)(3), and the conviction(s) occurs within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for one hundred eighty (180) days, but not including any time during which the license was suspended for one hundred eighty (180) days, the planning department shall forthwith revoke the license, and notify the licensee of the revocation.

198. Revocations based on criminal convictions on the premises are not limited to crimes committed by the license holder or management-level employees. The Ordinance imposes vicarious liability without a showing of responsible relationship in violation of the Due Process Clause of the Fourteenth Amendment. *See, Lady J. Lingerie*, 176 F.3d at 1367-69; *Rameses, Inc. v. County of Orange*, 481 F. Supp. 2d at 1326-27.

Unconstitutional Tax

199. Chapter 12 requires the payment of fees and taxes under several provisions:

A. An application fee is referenced in both §12-396 and §12-410:

Sec. 12-396.

...

(c) *Application fee.*

(1) Any sexually oriented business establishment shall pay, to the planning department, and prior to application for a license, a nonrefundable fee in an amount to cover the expenses of the location analysis necessary to obtain a sexually oriented business permit pursuant to section 12-410 of these regulations. The amount of the fee shall be established by ordinance....

Sec. 12-410.

...

(b) *Required information.* In order to obtain a sexually oriented business permit, the applicant shall provide, in addition to a fee determined by the city commission to be reasonably calculated to cover the costs of administering this permitting requirement...

B. An annual "regulatory fee" is also required under §12-400:

Sec. 12-400. - Annual licensing regulatory fees; levy of; regulatory in nature.

(a) Levy of license fees. In order to cover the administrative and enforcement costs associated with these regulations, there are hereby levied annual licensing regulatory fees under these regulations for a sexually oriented business establishment in amounts set by ordinance.

(b) License fees are regulatory in nature. The annual license fees collected under these regulations are declared to be regulatory fees which are collected for the purpose of examination and inspection of sexually oriented business under these regulations and the administration thereof. These regulatory fees are in addition to, and not in lieu of, the business tax receipt, building permit, land development, food establishment fees, and other fees imposed by other sections of the Code of Ordinances of the City of Ormond Beach, Florida.

200. On information and belief, Counter-Plaintiffs allege that the CITY OF ORMOND BEACH has not set a fee for either the review of a sexually oriented business

application or for the annual regulatory fee. Therefore any fee demanded in conjunction with an application or license would be entirely arbitrary.

201. Section 12-399 requires the payment of a separate application fee for every category in which a sexually oriented business may be classified. The application fee supposedly includes the cost of investigation. However, since only a single investigation is necessary to determine the applicant's compliance with the licensing requirements, the additional application fees amount to unconstitutional double and triple taxation without any possible justification in terms of investigatory expenses.

202. Furthermore, the CITY has not conducted any studies to determine the actual cost of administering its program so that the amount of any tax or fee would be entirely arbitrary. Such an arbitrary fee represents an unconstitutional tax on speech. *See, Fly Fish*, 337 F.3d at 1314-15.

Content-Based Restriction on Dance Performances

203. Section 12-412(c)(5) prohibits dance performance in a sexually oriented business which include "simulated sexual activities":

(c) *Allowing employee(s) to engage in prohibited acts.* It shall be a violation of these regulations for any business entity, licensee, or for any operator of a sexually oriented business establishment, regardless of whether licensed under these regulations, to knowingly or with reason to know, permit, suffer, or allow any employee:

...

(5) To display or expose any specified anatomical area while simulating any specified sexual activity with any other person at the sexually oriented business establishment, including with another employee;

204. Expressive movements intended to give the impression of sexuality and sensuality are natural and routine components of exotic dance performances

205. Section 12-412(c)(5) is a content-based restriction on speech because it restricts certain dance movements and gestures above and beyond prohibiting overt sex acts. *See, Rameses, Inc. v. County of Orange*, 481 F. Supp. 2d at 1322.

206. The term “simulated” is not defined in the Code and has no commonly understood meaning. The term “simulated” is unconstitutionally vague.

207. The definition of “specified anatomical areas” in Section 12-392 is unconstitutionally overbroad because it incorporates more speech than is necessary to meet the asserted government interest. The claimed government interest is to prohibit the display of the “entire cleft of the male or female buttocks”:

Specified anatomical areas means:

- (1) Less than completely or opaquely covered:
 - ...
 - b. The entire cleft of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-strings, T-backs, and thongs;

By definition, a T-back bathing bottom covers the cleft of the buttocks. A T-back includes a (typically triangular) swatch of cloth which covers both the anal cleft and a portion of the buttocks. The prohibition against T-back bottoms is thus overbroad.

Excessive Fine or Penalty:

169. Section 12-405(c) provides an automatic ten year disqualification upon revocation of a license, which amounts to a forfeiture of the business for relatively minor offenses:

(c) Effect of revocation. If a license is revoked, the licensee shall not be allowed to obtain another sexually oriented business license for a period of ten (10) years from the effective date of revocation.

208. Section 12-405(c) is a disproportionate penalty which far exceeds any remedy of a civil nuisance available under statute or the common law (typically providing for one-year closures).

209. Section 12-405(c) violates the Excessive Fines Clause of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment and Article 1 §17, of the Florida Constitution. *See, U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998).

C. Section 12-405(c) imposes an unreasonably long prior restraint; it is equivalent to a ten year moratorium on speech, which is itself unconstitutional. *See, Howard v. City of Jacksonville*, 109 F.Supp.2d 1360 (M.D. Fla. 2000).

Unreasonable Disqualification

210. The Ordinance automatically forbids a person from reapplying for a sexually oriented business license for a period of six months in the event an earlier application is denied:

(5) If a person applies for a license at a particular location within a period of six (6) months from the date of denial of a previous application for a license at the location, and there has not been an intervening change in the circumstances material to the decision regarding the former reason(s) for denial, the application shall not be accepted for consideration.

211. The automatic disqualification provision acts as a prior restraint and is an unreasonable burden on speech for the following reasons:

A. There is no governmental purpose served by this provision and any asserted governmental interest is outweighed by the clear burden on speech. If the applicant is not qualified to do business, the government's remedy is simply to deny the new license application. The government suffers no hardship from that process as it receives a fee which supposedly offsets the cost of investigating the license and administering the licensing program.

B. The automatic disqualification is not limited to the original applicant. For instance, if the property is sold to another person, that new person is still disqualified from applying for a license.

C. The six month time period is an unreasonably long prior restraint; it is equivalent to a six month moratorium on speech, which is itself unconstitutional. *See, Howard v. City of Jacksonville, supra.*

D. The limited waiver of the six (6) month disqualification period is unconstitutionally vague and vests unbridled discretion in the hands of the permitting official:

(1) The Ordinance does not even identify the permitting official who is given the discretion to accept or refuse to accept the license application;

(2) The criteria for evaluating a reapplication are not ministerial but vest unfettered discretion in the hands of the decisionmaker: "circumstances material to the decision regarding the former reason(s) for denial" is inherently vague and standardless.

(3) There is no procedure for challenging the decision not to accept the license application for processing.

Warrantless Searches

212. Section 12-394(g) of the Ordinance grants the police and zoning and codes officials the right to undertake warrantless searches of any business regulated by the Chapter:

(g) Any employee of the departments referenced in subsections (b) through (f) above, who is authorized by the head of that department, shall, at any reasonable hour, when the department has reasonable cause to believe that a violation of these regulations may exist, have access to, and shall have the right to inspect, the premises of all licensees under these regulations for compliance with any or all of the applicable codes, statutes, ordinances, and regulations in effect in the city, and within the responsibilities of their respective departments as outlined in subsections 12-394(b) through (f). Such employee shall require strict compliance with the provisions of these regulations. Reports of violations shall be reported to the planning department.

213. Counter-Plaintiffs' business is subject to certain limited inspections because it sells alcoholic beverages. However, those administrative inspections are not equivalent to the unrestricted, warrantless searches authorized by §12-394(g). Moreover, the warrantless searches under §12-394(g) are not limited to the public areas of the business, but extend on their face to such private areas as dressing rooms and bathrooms.

214. Section 12-394(g) is unconstitutional because it infringes on Counter-Plaintiffs' Fourth Amendment right to be free of unreasonable searches and seizures.

215. The Ordinance allows for searches on the basis of a "reasonable cause to believe" rather than the requisite showing of probable cause required by the Fourth Amendment.

216. The requirement in §12-407(e) that the premises be available for inspection “at any reasonable hour” (including, by implication, times when the establishment is not open for business) is vague, overbroad, and encourages arbitrary and abusive enforcement.

217. The requirement of public access to a sexually oriented business license is unreasonable and a requirement not imposed on any other kind of business.

Personal Advertising

218. Section 12-412(m) purports to prohibit “solicitation or personal advertising” on the premises of a sexually oriented business:

Sec. 12-412. - Prohibited operations, acts, advertisements, and actions of sexually oriented business establishments.

...

(m) Solicitation or personal advertising. It shall be a violation of these regulations for any employee of an sexually oriented business establishment while situated outside any structure on the site of an sexually oriented business establishment, or while the employee is situated at a place at or near the sexually oriented business establishment where the employee is visible from any public right-of-way or sidewalk, to display or expose specified anatomical areas or engage in personal advertising, pandering, solicitation, whether passive or otherwise, on behalf of the employee, any other employee, or the sexually oriented business establishment. Personal advertising includes, but is not limited to, sitting or standing outside any structure on the site of the sexually oriented business establishment, gesturing, waving, repeatedly speaking in a raised tone of voice, or otherwise encouraging or enticing potential customers beyond the sexually oriented business establishment to enter the sexually oriented business establishment.

219. That provision is unconstitutional for the following reasons:

A. It imposes a content-based restriction on speech which does not employ the least restrictive means and is not supported by a compelling governmental interest. Under this

provision, employees of a sexually oriented business can solicit passersby for any other cause or any other business save for their employer's establishment.

B. The provision is unconstitutionally vague in multiple respects, including what constitutes "gesturing" or "waving" or what decibel level would offend the prohibition against "repeatedly speaking in a raised tone of voice".

C. The provision discriminates for content-based and view-point based reasons in violation of Equal Protection as no other businesses or citizens are similarly burdened.

Unconstitutionally Vague Provisions

220. In order to satisfy the requirements of due process and to avoid chilling of free speech, a penal or licensing measure directed to sexually oriented businesses must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the ordinance.

221. A number of provisions of the Ormond Beach Ordinance regulating sexually oriented businesses are unconstitutionally void and encourage arbitrary and discriminatory enforcement. Those provisions include the following :

A. Section 12-409(c)(2) – states that a private performance area shall "[h]ave a well-illuminated continuous main aisle alongside the booth...". The term "well-illuminated" is not defined in the Code and has no commonly understood meaning.

B. Section 12-411(c)(1) directs the Board of Adjustment to determine whether "a sufficient physical barrier separates the sexually oriented business establishment, for which a variance is being sought, from the land use(s) which has caused the sexually oriented business

not to be in compliance with the distance requirement of this article”. The term “sufficient physical barrier” is not defined in the Code and has no commonly understood meaning.

C. Section 12-412(c)(7) is a non-grammatical and utterly indecipherable provision:

(7) To, while engaged in the display or exposure of any specified anatomical area, intentionally touch, either directly or through a medium, any person, except another employee, at the sexually oriented business establishment, except for the purpose of passing a gratuity from the hand of the patron to the hand of the employee, provided the person maintains a distance of three (3) feet from the employee;

This section appears to allow direct tipping of a performer provided that the patron’s arm is at least three feet long, which assumes a body of orangutan-like proportions.

Unreasonable Burden on Free Speech

222. Laws which restrict free speech must be narrowly tailored and the restriction must further some substantial government interest.

223. A number of provisions of the Ormond Beach Ordinance regulating sexually oriented businesses impose an unreasonable burden on free speech without furthering any substantial government interest. Those provisions include the following:

A. Section 12-401 requires that a sexually oriented business to waive its statutory and constitutional rights in exchange for issuance of a license:

Sec. 12-401. - Records and reports; consent by licensee.

...

(b) Consent. By holding a license under these regulations, the licensee shall be deemed to have consented to the provisions of these regulations and to the exercise of such provisions by the planning department, police department, and other departments of their respective responsibilities under these regulations.

Government may not condition the granting of a benefit on the waiver of free speech or other constitutional rights.

B. Section 12-412(b)(3) prohibits a sexually oriented business from locking its entryways at any time a patron is inside. Local fire codes require that CHEATERS, like every other commercial establishment, maintain multiple exits for the safety of their patrons and employees. For security purposes, Counter-Plaintiffs lock the entrances, other than the main entrance, during business hours so that persons outside the establishment cannot enter.⁸ Section 12-412(b)(3) serves no government purpose and unnecessarily exposes Counter-Plaintiffs, and their employees, contractors and patrons, to the risk of crime.

C. Section 12-406 requires that a sexually oriented business maintain certain personal information concerning its employees and to make those records available, without a warrant or Court Order, to law enforcement officers as well as health and codes officials:

Sec. 12-406. - Records for employees.

(a) The licensee of a sexually oriented business establishment is responsible for keeping a record of all employees who are currently employed by the establishment, and of all former employees who were employed by the establishment during the preceding one-year period. The record shall contain the current or former employee's full legal name, including any aliases, his/her date of birth, and his/her residential address.

...

(d) Any operator of the sexually oriented business establishment shall, upon request by a law enforcement officer, health unit official, or a representative of the planning department, make available for inspection, the original records, or the true and exact photocopies thereof, while the establishment is open for business.

⁸ Such locked entrances have “panic hardware” to allow persons inside the establishment to escape in an emergency.

Section 12-412(g) makes it a crime for a business to withhold those personnel records. The records provisions violate the Fourth Amendment because they do not require a warrant or Court Order for access. Furthermore, those provisions infringe upon First Amendment and privacy rights because they allow for unfettered access to personal identifying information without a substantial government interest.

WHEREFORE, the Counter-Plaintiffs pray for the following relief:

- A. That this Court take jurisdiction over the parties in this cause;
- B. That this Court enter an Order declaring that all of the foregoing Ordinance provisions are unconstitutional on their face and as applied to the Counter-Plaintiffs;
- C. That this Court enter an Order declaring that the foregoing provisions are so pervasive and intertwined that they are not severable from the CITY's remaining regulations governing sexually oriented businesses;
- D. That this Court enter an Order permanently enjoining ORMOND BEACH and its agents from enforcing: (1) Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and (2) the entirety of Chapter 12, Article XIV of the Code of Ordinances, against the Counter-Plaintiffs and all other similarly situated persons.
- E. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and
- F. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT VII

Lack of Factual Predicate; Content-Based Law

224. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 74 of their Counterclaim as if fully set out herein.

225. A time, place and manner regulation of First Amendment protected expression and/or expressive conduct is unconstitutional if the regulation does not further a substantial governmental interest and is not narrowly tailored to do so. In the context of adult entertainment and exotic dance such a regulation does not further such an interest unless the regulating authority or municipality can demonstrate a connection between the constitutionally protected expression and adverse secondary effects which prompted the adoption of the regulation.

226. Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and Chapter 12, Article XIV of the Code of Ordinances were enacted without consideration of any pertinent studies which demonstrate a nexus between adult businesses and any adverse secondary effects. *See, City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 439, 122 S.Ct. 1728, 1736 (2002) and Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida, 337 F.3d 1251 (11th Cir. 2003). In particular, Counter-Plaintiffs allege:

A. The studies referenced in Chapter 12, Article XI are not relevant to this particular community. Any “studies” relied on by ORMOND BEACH are drawn from obsolete examples and scientifically flawed reports which are demographically unrelated to the actual circumstances found in ORMOND BEACH.

B. There were no local studies conducted and no local data in support of this Ordinance.

C. To the extent the Ordinance is based on “studies” of any kind, those studies consist of shoddy data or reasoning; the CITY’s evidence does not fairly support its rationale for its Ordinances.

D. The adult businesses already operating in nearby communities do not cause adverse secondary effects of any kind, which fact is both known to the CITY and the subject of empirical proof. No reasonable legislator could believe that adult businesses cause adverse secondary effects in the community or are likely to do so in the future.

227. Attempts to enforce the CITY’S regulations governing sexually oriented businesses are illegal and unconstitutional because those Ordinances lack a proper factual predicate and the Ordinances are content-based.

WHEREFORE, Counter-Plaintiffs pray the following relief:

A. That this Court take jurisdiction over the parties and the cause;

B. That this Court enter an Order declaring Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and Chapter 12, Article XIV of the Code of Ordinances to be unconstitutional as they further no substantial governmental interest and are not supported by a showing of adverse secondary effects;

C. That this Court enter an Order permanently enjoining the enforcement of Chapter 2, Article IV, Sections S(2) and 2-29-D-18 of the Land Development Code and Chapter 12, Article XIV of the Code of Ordinances.

D. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs’ costs and attorneys’ fees; and

E. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT VIII

(Pretextual Enforcement; Police Misconduct)

228. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 43 of their Counterclaim as if fully set out herein.

229. The CITY OF ORMOND BEACH and its officials object to the content of Counter-Plaintiffs' dance performances.

230. The CITY OF ORMOND BEACH intends to censor Counter-Plaintiffs' dance performances through harassment, unfounded legal action and outright prohibition.

231. The CITY'S objection to Counter-Plaintiffs' speech is apparent from repeated public pronouncements of legislators, law enforcement personnel and CITY staff stating their intent to close Counter-Plaintiffs' business by any means necessary

232. The CITY's objection to Counter-Plaintiffs' speech is also seen in concrete action taken to harass Counter-Plaintiffs, and their employees, contractors and patrons.

233. Prior to Counter-Plaintiffs' opening of CHEATERS, agents of the CITY attempted to interfere with and delay the licenses and approvals issued by Volusia County.

234. The CITY involuntarily annexed Counter-Plaintiffs' property into ORMOND BEACH, not as part of an sensible plan for annexation, but out of a desire to exercise direct regulatory control over Counter-Plaintiffs.

235. On September 23, 2010, even prior to Counter-Plaintiffs' annexation into the CITY, the CITY threatened to turn off Counter-Plaintiffs' access to public utilities, including water and sewage.

236. Even before Mr. Watts' letter was received, the CITY shut off the potable water servicing Counter-Plaintiffs' property.

237. On information and belief Counter-Plaintiffs assert that the CITY has *never* shut off utilities to a customer on any other occasion except for instances of non-payment and necessary maintenance or repair.

238. Counter-Plaintiffs were current on their utility payments and no maintenance was conducted with respect to the utilities servicing Counter-Plaintiffs' property. Rather the utilities were cut off for the purpose of harassment and to deter Counter-Plaintiffs from engaging in their chosen speech activities.

239. Water service to Counter-Plaintiffs' property was restored only after Counter-Plaintiffs filed a Federal lawsuit and a hearing was scheduled on Counter-Plaintiffs' Motion for a Temporary Restraining Order. *See, generally, 1545 Ormond Beach, LLC v. City of Ormond Beach*, Case No.: 6:10-cv-01416-MSS-GJK (M.D. Fla.).

240. Upon annexation into the CITY, ORMOND BEACH police officers undertook a campaign of harassment which has continued to this day. Counter-Plaintiffs allege the following particulars:

A. For the first several months after CHEATERS opened, uniformed officers came into Counter-Plaintiffs' establishment on a daily basis. At no time did those officers have a

warrant to come on to the property. Neither did the officers conduct a “bar check” to verify compliance with Florida’s laws pertaining to alcoholic beverages. Instead, the uniformed officers merely stood inside the front door for periods of between 15 and 30 minutes. The presence of those officers was intended to disrupt Counter-Plaintiffs’ business and to disturb Counter-Plaintiffs’ patrons and the “inspections” actually had that intended effect.

B. During these “inspections” officers would park their cars directly in front of the entrance to Counter-Plaintiffs’ business rather than in the parking spots provided for Defendant’s customers. The police cars were intended to make it difficult for Counter-Plaintiffs’ patrons to enter and leave the premises and the parked cars actually had that intended effect.

C. Multiple police cars would routinely park in Counter-Plaintiffs’ parking lot for long periods of time without Counter-Plaintiffs’ permission (sometimes in conjunction with the above-described inspections and sometimes for no apparent purpose at all). The parking of multiple police cars in Counter-Plaintiffs’ lot was intended to convey the impression that Counter-Plaintiffs business was being “raided” so that patrons would be deterred from entering the premises.

D. Multiple police cars were parked in the median across from CHEATERS and on the properties immediately adjacent to Defendant’s property. ORMOND BEACH police cars were not similarly parked near other businesses in the community – even near those bars which were known to be associated with disproportionately high calls for police services.

E. Police officers would be seen writing down all of the license plate numbers of the vehicles parked in Counter-Plaintiffs' parking lot in an effort to intimidate CHEATERS' customers and to dissuade them from patronizing the business.

241. The frequent searches and intrusions onto CHEATERS's property have not been for the purpose of enforcing laws pertaining to alcoholic beverage establishments, but rather have been entirely pretextual and are intended to disrupt CHEATERS' business and to interfere with its constitutionally protected speech.

242. The purpose of these inspections and walk-throughs is to harass Counter-Plaintiffs' employees and contractors and to discourage the patrons and potential customers of the business

243. The actions of the police were intended to punish and intimidate the Counter-Plaintiffs, and their employees, contractors and patrons for the exercise of their rights under the First Amendment to the Constitution of the United States. The CITY was and is motivated by an evil motive or intent to prevent Counter-Plaintiffs from exercising their constitutional rights and from conducting their lawful business.

244. Ultimately, the police harassment had reached such proportions that counsel for the Counter-Plaintiffs issued a trespass notice to the Chief of Police advising him that law enforcement officers were barred from the premises except for those legitimate law enforcement purposes allowed by law. A copy of the October 22, 2010 letter to Chief Andy Osterkamp is attached as Exhibit "D" to this Counterclaim.

245. For a period of approximately one year, this trespass notice seemed to have some positive effect on police behavior at Counter-Plaintiffs' place of business.

246. However, in recent months, ORMOND BEACH uniformed police officers have again come into and onto Counter-Plaintiffs' property and have parked their cars on and adjacent to Counter-Plaintiffs' property in disregard of the trespass notice and for no legitimate public purpose.

247. Within the past month, ORMOND BEACH uniformed police officers have come onto Defendant's property uninvited and left intimidating leaflets on the windshields of all of the cars in Counter-Plaintiffs' parking lot. Those leaflets warned of allegedly high crime in the area even though CHEATERS is widely known to generate less crime and fewer calls for service than other bars in the area. In addition, to distributing the leaflets, the police officers wrote down the license plate tags of all of the customers in Counter-Plaintiffs' parking lot. A copy of one of the leaflets left by an ORMOND BEACH police officer on a patron's car is attached as Exhibit "E" to this Counterclaim.

248. The CITY is well aware of the fact that Counter-Plaintiffs operate a "bikini bar" and do not operate or purport to operate a "sexually oriented business".

249. The CITY is well aware of the fact that "bikini bars" of similar format are commonplace in Volusia County and in the incorporated municipalities within the County.

250. The CITY is well aware of the fact that bikini bars in neighboring communities are not regulated as sexually oriented businesses despite regulatory regimes for adult businesses in those cities which are very similar to ORMOND BEACH's adult ordinances.

251. Counsel for the Counter-Plaintiffs has previously advised counsel for the CITY that the CITY's regulations of sexually oriented businesses are clearly unconstitutional under controlling case law for many of the reasons expressed in this Counterclaim.

252. The present litigation and the ongoing harassment by CITY police officers are part of a concerted policy and actual practice to discriminate against the Counter-Plaintiffs, and to harass and intimidate Counter-Plaintiffs and their employees, contractors and patrons, all in an effort to censor and suppress Counter-Plaintiffs' speech rights. While not reduced to writing, these official policies are universally understood, consistently applied and adopted as part of the "culture" of the CITY.

253. The Counter-Plaintiffs have suffered and will continue to suffer damages in that their civil rights have been violated and continue to be violated by the CITY.

WHEREFORE, Counter-Plaintiffs pray the following relief:

- A. That this Court take jurisdiction over the parties and the cause;
- B. That this Court enter an Order declaring that the CITY has unlawfully harassed and discriminated against Counter-Plaintiffs because of a content-based objection to Counter-Plaintiffs' speech;
- C. That this Court enter an Order declaring that the CITY instituted the present action in bad faith with the intention of harassing and discriminating against Counter-Plaintiffs because of a content-based objection to Counter-Plaintiffs' speech; and that such bad faith precludes any injunctive relief under the equitable doctrine of unclean hands;

D. That this Court enter an injunction barring any law enforcement officers employed by the CITY OF ORMOND BEACH from entering onto Counter-Plaintiffs' property and business except under the following limited conditions:

- (1) Pursuant to a warrant or other Court order;
- (2) Pursuant to probable cause to believe that a crime has been or is about to be committed on the premises;
- (3) To protect against an immediate threat to human life or safety as in the case of a fire, gas leak or similar emergency.
- (4) Upon invitation by the Counter-Plaintiffs or to respond to a call for service placed by Counter-Plaintiffs or one of its agents, employees or patrons,

E. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and

D. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

COUNT IX

(SELECTIVE ENFORCEMENT; CUSTODIAL ARRESTS)

254. Counter-Plaintiffs re-allege and incorporate paragraphs 1 through 43 of their Counterclaim as if fully set out herein.

255. The CITY OF ORMOND BEACH and its officials object to the content of Counter-Plaintiffs' dance performances.

256. The CITY OF ORMOND BEACH intends to censor Counter-Plaintiffs' dance performances through harassment, unfounded legal action and outright prohibition.

257. The CITY'S objection to Counter-Plaintiffs' speech is apparent from repeated public pronouncements of legislators, law enforcement personnel and CITY staff stating their intent to close Counter-Plaintiffs' business by any means necessary

258. The CITY's objection to Counter-Plaintiffs' speech is also seen in concrete actions taken to harass Counter-Plaintiffs, their employees, contractors and patrons.

259. Rule 3.125, Fla.R.Crim.P. creates a procedure for issuing Notices to Appear in lieu of effecting a custodial arrest for minor criminal violations, including the violation of municipal ordinances.

233. While issuance of a Notice to Appear is discretionary, it is widely held that such Notices are preferable to custodial arrests because they conserve scarce police and judicial resources as well as avoiding the unnecessary overcrowding of jails.

260. Police agencies throughout Florida have adopted a policy preferring that officers issue Notice to Appear under those circumstances where a Notice is appropriate under Rule 3.125, Fla.R.Crim.P.

261. On information and belief, Counter-Plaintiffs allege that the ORMOND BEACH police department has adopted a formal policy or custom and practice of issuing Notices to Appear, in appropriate circumstances, rather than effecting custodial arrests.

262. On information and belief Counter-Plaintiffs allege that the ORMOND BEACH police department routinely issues Notices to Appear for alleged violations of municipal ordinances. Such Notices are typically issued “on the scene” without transporting the alleged violator to the police station or jail. For all intents and purposes, the alleged violator is issued a “ticket” which requires that he or she later appear before a Court to answer to the charges.

263. Officers employed by the CITY OF ORMOND BEACH have arrested a number of performers in Counter-Plaintiffs’ establishment – primarily for “costume violations”. All of the arrests have been for violation of municipal ordinances or for misdemeanors.

264. On information and belief. Counter-Plaintiffs allege that all of the performers arrested at CHEATERS were eligible for a Notice to Appear as they had identification, were local residents and otherwise met the criteria for issuance of a Notice to Appear.

265. In each instance, CITY officers arrested the performers and removed them from the premises prior to issuing a Notice to Appear. It is believed that the performers were each taken to the police station or to the jail before they were released from custody.

266. The ORMOND BEACH police department does not routinely arrest other persons alleged to have violated municipal ordinances, but instead detains them only long enough to issue the Notice of Appearance at or near the place where the violator was initially stopped.

267. The ORMOND BEACH police department arrested Counter-Plaintiffs’ performers and removed them from the premises in order to cause the maximum amount of

disruption to Counter-Plaintiffs' business and to directly interfere with the performer's ability to engage in constitutionally protected dance.

268. The policy of issuing Notices to Appear in conjunction with a custodial arrest is not arbitrary or accidental, but is an intentional effort to interfere with Counter-Plaintiffs' First Amendment rights and those of their performers.

269. The policy of issuing Notices to Appear in conjunction with a custodial arrest is intended to single out Counter-Plaintiffs and their contractors for special punishment and disparate law enforcement treatment.

270. The arrest of Counter-Plaintiffs' performers is intended to and has the actual effect of interfering with the dissemination of Counter-Plaintiffs' speech. In particular, Counter-Plaintiffs allege the following:

A. The removal of individual performers obviously means that that performer is not available to dance for Counter-Plaintiffs' customers during the lengthy detention.

B. The police prevent Counter-Plaintiffs' other performers, not accused of violating the law, from dancing while the police take the alleged violators into physical custody.

C. The risk of a custodial arrest deters other performers from working for the Counter-Plaintiffs; those performers choose to relocate to bikini bars in nearby municipalities where accredited police honor and defend the Constitution rather than abuse it.

271. The arrest of Counter-Plaintiffs' performers is part of a larger policy of harassment and intimidation designed and intended to drive Counter-Plaintiffs out of business and to stifle their speech because of official disapproval of the content of their expression.

272. The pattern of selective enforcement and harassment outlined above is not an accidental outcome of varying enforcement regimes or a function of normal police patrols, but is instead the result of a calculated and intentional policy of the CITY to infringe upon Counter-Plaintiffs' constitutional rights and to suppress the erotic dance offered by the Counter-Plaintiffs. Such actions further infringe upon the constitutional rights of Counter-Plaintiffs' employees, contractors and patrons.

273. The above-described campaign of persecution and prosecution is not based on any legitimate governmental objective, but is rather an intentional policy adopted and approved by the CITY to drive Counter-Plaintiffs out of business and to stifle their speech because of official disapproval of the content of their expression.

274. The CITY's policy to establish and encourage the selective enforcement of the law against Counter-Plaintiffs is a violation of Counter-Plaintiffs' First Amendment rights, as well as their Fourth Amendment right against unreasonable seizures and their Fourteenth Amendment rights of Equal Protection and Due Process, as more particularly set forth hereinabove.

WHEREFORE, Counter-Plaintiffs pray for the following relief:

- A. That this Court take jurisdiction over the parties and this cause;
- B. That this Court enter a permanent injunction forever enjoining the CITY and its agents, servants, employees and all others in concert with or under their direction and control from effecting custodial arrests of performers at CHEATERS where the performers otherwise qualify for issuance of a Notice to Appear under Rule 3.125, Fla.R.Crim.P.

C. That the Court grant supplemental relief including but not limited to an award of Counter-Plaintiffs' costs and attorneys' fees; and

D. That the Court award Counter-Plaintiffs all other relief in law and equity to which they may be entitled.

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was furnished to THOMAS J. LEEK, Esquire, 150 Magnolia Avenue, Daytona Beach, Florida 32115, by E-mail and U.S. Mail this _____ day of April, 2012.

BRETT HARTLEY, P.A.

GARY S. EDINGER, P.A.

BRETT HARTLEY, Esquire
Florida Bar No.: 140317
102 S Riverside Drive
New Smyrna Beach, FL 32168
(386) 427-1006/ (386) 427-1065 (Fax)
bretthartley@cfl.rr.com

GARY S. EDINGER, Esquire
Florida Bar No.: 0606812
305 N.E. 1st Street
Gainesville, Florida 32601
(352) 338-4440 (352) 337-0696 (fax)
GSEdinger@aol.com

Attorneys for 1545 Ormond Beach and 1545 Operations